PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL B. DURAND,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September, 2008

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QUESTIONS PRESENTED

Whether the City of Phoenix's (successful) urging of a 180-day time limitation, barring Mr. Durand's Charge of Discrimination, was itself an act of further retaliation against him; since the City is a "local agency" for federal civil rights purposes, and therefore must have known its argument for a 180-day limitations' period for filing charges of discrimination with the EEOC was highly *misleading*, as well as a direct *conflict of interest*.

Whether lower federal courts have not inadvertently undermined the combined support of the political branches, Legislative and Executive, for the ADA.

Whether the lower courts failed in their duty to preserve Petitioner's state claim for emotional distress, after holding his federal employment discrimination claims were time-barred.

PARTIES TO THE PROCEEDINGS

Parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit were the plaintiff-appellant, Michael B. Durand, an individual; and the defendant-appellee, City of Phoenix, Arizona, a municipal corporation.

There were no other parties but those named above.

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The Order of the Court of Appeals, Ninth Circuit, denying Mr. Durand's Petition for Panel Rehearing, dated 12 May 2008, is reproduced at App. 11.

The Order of the District Court, granting summary judgment to the City of Phoenix, dated 25 July 2006, is reproduced at App. 4-9.

The Judgment of the District Court for the District of Arizona, entered 25 July 2006, is reproduced at App. 10.

Each of the above-mentioned opinions, orders or judgments is unreported.

JURISDICTION

The Memorandum Opinion of the U.S. Court of Appeals, Ninth Circuit, was entered 25 March 2008 [App. 1-3]. A timely Petition For Panel Rehearing was denied by Order of 12 May 2008 [App. 11].

On 11 August 2008, pursuant to written application; Justice Kennedy extended the time for filing this Petition through 9 September 2008.

The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The questions presented involve the prohibition against discrimination, concerning qualified individuals with disabilities, under the Americans With Disabilities Act of 1990; specifically, 42 U.S.C. §§ 12112, 12116 and 12117; and 42 U.S.C. § 2000e-5, as incorporated by 42 U.S.C. § 12117.

One of the questions presented also involves the District Court's exercise of supplemental jurisdiction under 28 U.S.C. § 1367, over petitioner's Arizona claim for emotional distress.

Each such statute is reproduced in the Appendix at the page indicated in the Table of Contents.

STATEMENT OF THE CASE

Michael B. Durand, Petitioner herein, is a disabled Navy Construction Battalion (CB) veteran of the Vietnam War (100%+ Permanent Total), resulting from two combat tours of duty. Mr. Durand's disabilities are due to physical and internal injuries; to Agent Orange exposure with residuals (mainly Diabetes II,

vascular problems, glaucoma, cataracts and optical nerve damage); and to PTSD.

Mr. Durand's last employment, with the City of Phoenix, Arizona, Department of Public Works (Solid Waste), was as an operating engineer – specifically as a heavy equipment operator at the City's Skunk Creek Landfill (now closed). That employment gave rise to Mr. Durand's federal claims for discrimination based upon disability (PTSD); retaliation; harassment, including even house arrest; and an Arizona claim for emotional distress, arising from a hostile work environment.

Mr. Durand's employment ended in his constructive discharge by the City of Phoenix.

Taken as a whole, Mr. Durand's Complaint [App. 31-41, esp., Paragraphs 9-19,] fairly alleges a hostile work environment, including discrimination based on disability (PTSD); refusal to reasonably accommodate his PTSD; retaliation; harassment; non-payment of wages; a trumped-up charge of assault against a co-worker; a confrontation and verbal assault by a City manager, requiring Mr. Durand to leave work and seek immediate hospitalization; and even "house arrest."

More generally, Paragraph 28 of the Complaint asserts conduct by City managers, which was "malicious and oppressive," done with "conscious disregard of Plaintiff's rights and with the intent to injure Plaintiff." [App. 36].

From the time of Mr. Durand's employment application with the City of Phoenix in 1999, the City was on notice (1) of Mr. Durand's status as a Vietnam-era veteran; and, (2) of Mr. Durand's status as a *disabled* Vietnam-era veteran. Despite ample notice of Mr. Durand's disabilities, and his repeated requests for a reasonable accommodation for his PTSD; the City never addressed the ADA implications of his employment, much less afforded him an accommodation for PTSD or anything else.

Indeed, City managers seemed genuinely conflicted over their employee-veterans; especially, their *disabled* employee-veterans. Both veterans and disabled veterans are *preferred* in City hiring, the latter more than the former. Yet once employed, disabled vets are expected to behave just as the non-disabled; as if disabilities never affected job performance – at least not to an extent which might trigger an employer obligation to accommodate or otherwise assist the disabled employee.

With unintended humor in light of war in Iraq and Afghanistan, court and counsel discuss at the hearing on the City's Motion for Summary Judgment 24 July 2006; whether PTSD *is even a disability* within the meaning of the ADA, and assuming for discussion's sake that it is, what reasonable accommodations might look like. [Transcript of Summary Judgment hearing, 24 July 2006, pp. 5-11].

This colloquy between the District Court and the City's counsel at least admits the possibility PTSD

might be an ADA-relevant disability. City managers on the other hand, consistently *deny* that PTSD should *ever* have an effect upon employment or upon workplace decisions – going so far as to claim PTSD itself can be utilized as the basis of workplace discipline.

Sure enough, Mr. Durand's service-connected PTSD brought him into regular conflict with City managers, leading finally to his constructive discharge sometime between 15 October and 15 November 2004.

Though Mr. Durand can cite repeated instances of discrimination based upon disability, all of which contributed to an extremely hostile work environment for him; two perhaps best illustrate the nature of the problem.

In April of 2001, Mr. Durand's foreman, Nick Flores, continued to ride Mr. Durand over not sufficiently controlling dust conditions at the landfill. Mr. Durand objected to having to tread his way though dead dogs, decomposing in an area near a water tower, where operators drew water to keep down dust on haul roads.

In both sight and stench, the decomposing animals reminded Mr. Durand of the unremitting death he'd encountered in Vietnam. The foreman offered no relief, but instead preferred administrative charges against Mr. Durand for leaving work ill.

As is well known to residents and visitors, temperatures in Phoenix during summer months can easily top 120° F., without the addition of engine heat. During the summer of 2002, Mr. Durand was running a compactor cell, which lacked air conditioning. Mr. Durand complained to his acting foreman, Mike VanPorring, that the heat was unbearable, and as a result, he could not run the compactor at that time.

The two men had words, VanPorring calling Mr. Durand "a crazy old man" – even attempting to provoke him by saying, "Go ahead, *old man*, hit me!"

The "crazy old man" epithet stuck. Thereafter, Mr. Durand found that his complaints about workplace conditions, or his suggestions for their improvement, would be ridiculed and then ignored, or simply ignored. Now, Mr. Durand is an experienced operating engineer, whose advice and assistance is constantly sought in the private sector.

Beginning in September 2003, City managers conspired with Mr. Durand's estranged wife, Donna Garner, to fire him; deny him access to City facilities (including the landfill); and generally to support each other's legal proceedings against Mr. Durand.

On 12 December 2003, City managers fired Mr. Durand for an alleged "assault" upon a co-worker, Jim Mathis. This incident, which Mr. Durand believed had been cleared previously, had occurred 8 September 2003. Mr. Durand had been using a water cannon to wash off his co-worker's bulldozer. When the bulldozer's already-cracked window gave way, due

to the pressure of the water, soaking Mr. Mathis; the co-worker accused Mr. Durand of having sprayed him deliberately. Hence, the much delayed "assault" charge.

Mr. Durand had Civil Service rights, which he exercised with the assistance of legal counsel. On 19 April 2004, the City's Civil Service Commission acted, reducing Mr. Durand's termination of employment to a 240-hour suspension without pay.

Notwithstanding the Civil Commission's decision, however, City managers *refused* to reinstate Mr. Durand; unless –

> – he signed a "Last Chance Agreement" [App. 77-78], essentially agreeing to probationary employment for the next five years; and,
>
> – he accepted an undesirable job transfer (not mentioned in the Last Chance Agreement).

Mr. Durand chose to treat the City's refusal to reinstate him without conditions, as retaliation and constructive discharge – as well, the adverse job transfer and the City's refusal to process his nine union grievances. Mr. Durand engaged an attorney to prepare a notice of intent to sue the City for intentional infliction of emotional distress – distress culminating in his constructive discharge.

On 19 July 2004, Mr. Durand filed a charge of discrimination with the EEOC, which resulted in this litigation. [App. 68-70].

REASONS FOR GRANTING THE PETITION

1. The City of Phoenix's (successful) urging of a 180-day time limitation, barring Mr. Durand's Charge of Discrimination, was itself an act of further retaliation against him; since the City is a "local agency" for federal civil rights purposes, and therefore must have known its argument for a 180-day limitations' period for filing charges of discrimination with the EEOC was highly *misleading*, as well as a direct *conflict of interest*.

According to *Mohasco Corp. v. Silver*, 447 U.S. 807, 814 fn. 16 (1980),

> . . . Under the Moore decision, which we adopt today, a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. . . .

The City's attempted termination of Mr. Durand's employment occurred on 12 December 2003 [App. 4] (it was later reversed by Civil Service). Mr. Durand

filed his Charge of Discrimination 19 July 2004 [App. 5], less than 240 days after 12 December 2003.

Taken as a whole, Mr. Durand's Complaint [App. 31-41, esp., Paragraphs 9-19,] fairly alleges a hostile work environment, including discrimination based on disability (PTSD); refusal to reasonably accommodate his PTSD; retaliation; harassment; non-payment of wages; a trumped-up charge of assault against a co-worker; a confrontation and verbal assault by a City manager, requiring Mr. Durand to leave work and seek immediate hospitalization; and even "house arrest."

More generally, Paragraph 28 of the Complaint asserts conduct by City managers, which was "malicious and oppressive," done with "conscious disregard of Plaintiff's rights and with the intent to injure Plaintiff." [App. 36].

A hostile work environment, which Mr. Durand's surely was, triggers the "continuing violation" exception to the 240-day EEOC filing rule:

> We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period.

National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 105 (2002).

Morgan is a Ninth Circuit case, as is the instant case. In Mr. Durand's last EEOC Charge of Discrimination against the City of Phoenix (Public Works), he asserts the City's latest act of discrimination against him took place 22 March 2005; and that the discrimination was of a "continuing" nature. [App. 79, "Date(s) Discrimination Took Place" box].

Although unnecessary to a resolution of *this* case, the so-called "Worksharing Agreement," between the EEOC and the Civil Rights Division of the Arizona Attorney General's Office [App. 44-55], may have effectively extended the time for filing a Charge of Discrimination to 300 days (rather than 240 days). The EEOC surely believes its Agreement with Arizona has this effect, announcing the 300-day time limit in EEOC's printed literature [App. 56-58, esp., 57].

Section II(A) of the Agreement [App. 45] provides in pertinent part that the two agencies are agents of each other "for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially receives the charges." Further,

> The EEOC's receipt of charges on the FEPA's [state agency's] behalf will *automatically* initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706(c) and (e)(1) of Title VII. [App. 45, Sec. II(A) (emphasis added)].

Section II(A) of the Worksharing agreement is perhaps an effort by the two agencies to take advantage of this Court's 300-day language in *Mohasco Corp. v. Silver*, 447 U.S. 807, 815-817, while avoiding the 60-day deduction required by *Mohasco* at Page 817.

Whether EEOC and the Arizona agency have succeeded in this task is of course a matter of statutory construction, involving also an interpretation of *Mohasco*. However, the EEOC's interpretation of the statutes it administers is entitled to "great deference":

> . . . When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' Unemployment Comm'n v. Aragon, 329 U.S. 143, 153.

Udall v. Tallman, 380 U.S. 1 (1965).

Indeed, the District Court uses this legal principle *against* Mr. Durand [App. 5], when it quotes the EEOC's "Dismissal and Notice of Rights," as telling Mr. Durand the agency could not investigate his charge, "because it was not filed within the time limit required by law." [Id.]

The problem: the actual Dismissal and Notice of Rights, pertaining to the charge Mr. Durand actually sued upon, says no such thing! [App. 74-75]. Rather, the actual EEOC Dismissal says in pertinent part, "the EEOC is unable to conclude that the information obtained establishes violations of the statutes." [App. 75, the only checked box].

In other words, the District Court, deferring as it believed to the EEOC on the timeliness issue; grounded its decision upon a clerical error: the wrong EEOC Dismissal got attached to the Complaint, due ultimately to an agency "typographical error" [App. 71]; and both court and counsel utilized the wrong document thereafter. [App. 5].

Mr. Durand brought the error to the Court of Appeals' attention, via a Motion to Return Case to Phoenix for Additional Proceedings. But far from ordering a remand, the Court of Appeals, has never even acknowledged the error or discussed what part the error may have played in the District Court's decision.

Whatever the applicable time period in Arizona for filing a charge (180, 240 or 300 days, or some other number), such limitations' period will *not* be set in stone:

> As we have held, however, this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) ("We hold that filing a timely

> charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly. See Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984) (per curiam). ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants"). . . .
>
> As noted in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), the filing period is not a jurisdictional prerequisite to filing a Title VII suit. Rather, it is a requirement subject to waiver, estoppel, and equitable tolling "when equity so requires."

Id., at 398. *National Railroad Passenger Corporation v Morgan*, 536 U.S. 101, 121 (2002).

Thus, Mr. Durand's ADA claims should not have been disposed of by summary judgment, since –

> – his Charge of Discrimination was timely; and plenary proceedings would surely have revealed that timeliness, both as a matter of fact and law; and,
>
> – the District Court never considered hostile work environment, never examined "all the circumstances"; never considered the repeated and continuing City violations or EEOC's

300-day representations [App. 56-58]; never considered Mr. Durand's complaint, submitted to the US Department of Labor [App. 66-67], and referred by that Department to the EEOC; never considered Mr. Durand's complaints to various city officials, all of whom were obliged to refer those complaints to the City's own Equal Opportunity Office; never considered Mr. Durand's nine grievances submitted through his labor union; and never considered any of the other equitable grounds that might have justified a departure under *Morgan*, supra, from any of the possible limitations' periods.

2. The political branches, Legislative and Executive, unite in their support of the ADA – support now inadvertently undermined by the decisions of certain lower federal courts.

The Americans with Disabilities Act of 1990 (Pub. L. 101-336) (ADA), as amended, appears in Volume 42 of the United States Code, beginning at section 12101. Title I of the ADA, which became effective for employers with 25 or more employees on 26 July 1992, prohibits employment discrimination against qualified individuals with disabilities. Title I became effective, as to employers with 15 or more employees, on 26 July 1994.

Thus, the ADA was both adopted and took effect during the administration of President George H. W. Bush. Strong support for the ADA continues under

the administration of the first President Bush's son, President George W. Bush, in the form of both the LEAD Initiative and the New Freedom Initiative of the EEOC. [App. 59-65].

LEAD (Leadership for the Employment of Americans with Disabilities) is the EEOC's initiative to address the declining number of employees with targeted disabilities in the federal workforce. [App. 59-61]. The goal for this initiative is to significantly increase the population of individuals with severe disabilities employed by the federal government. [App. 59-60].

New Freedom Initiative promotes the full integration of people with disabilities into all aspects of American life. [App. 62-65]. The goals of this comprehensive plan include expanding educational and employment opportunities; increasing access to assisting technologies and public accommodations; and providing accessible transportation and housing options for individuals with disabilities. [App. 62].

The New Freedom Initiative builds upon the progress made by the Americans with Disabilities Act of 1990 (ADA), in protecting the civil rights of approximately 54 million Americans with disabilities. [Id.]

The Equal Employment Opportunity Commission (EEOC) has taken a leading role in implementing the

employment goals of both Initiatives. [App. 59 and 62].

The purposes and goals of the ADA, and of the two Initiatives, are effectively frustrated by,

> (1) the lack of easy access to the EEOC, analogous state and local agencies, and to the federal courts; and,
>
> (2) unsympathetic, sometimes even hostile treatment, once the employee gets to the EEOC (or other agency) or to court.

Given the consensus supporting the ADA and its objectives, why should EEOC filing deadlines be a matter of conjecture, or still worse dispute, among the courts, agencies, public and private employers, and others charged with administering the ADA?

If Worksharing Agreements extend EEOC filing deadlines from 240 days to 300 days, why aren't these agreements (and their legal effects) better known; and why aren't the agreements themselves more readily accessible to the public? Upon learning of the existence of such a Worksharing Agreement in Arizona, Mr. Durand found it necessary to file a FOIA request just to secure a copy! [App. 42-43].

The instant case reveals graphically, not only a hostile work environment – hostile, certainly, to combat veterans with PTSD – but also discloses a

surprising aversion toward the ADA itself, beginning with the City of Phoenix and continuing right through the lower federal courts, which have dealt with this case.

3. The lower courts failed in their duty to preserve Petitioner's state claim for emotional distress, after holding his federal employment discrimination claims were time-barred.

The Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, merely codified, rather than supplanted, existing decisions concerning pendent or ancillary jurisdiction. In pertinent part, that statute provides,

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
>
> . . . (3) the district court has dismissed all claims over which it has original jurisdiction. . . . [28 U.S.C. § 1367(c)(3)].

In the instant case, the District Court conducted an oral hearing 24 July 2006 on defendant City's Motion for Summary Judgment. At that hearing, the trial court, orally, from the bench, granted summary judgment as to Mr. Durand's Arizona claim for emotional distress, only – reserving ruling on his

federal ADA discrimination claims for a later date. [App. 5, fn. 1].

The District Court followed up its oral ruling from the bench with a written order, which of course, did not dispose of the entire case; since it dealt only with Mr. Durand's supplemental state claim for emotional distress. [Id.]. That fact – not disposing of the whole case – made the District Court's Order of 24 July 2006 interlocutory in character.

In its Order of 25 July 2006, however, the District Court granted the City of Phoenix summary judgment on Mr. Durand's ADA claims, finding untimely his Charge of Discrimination to the EEOC. [App. 4-8]. Though the trial court notes its decision the preceding day, on Mr. Durand's emotional distress claim [App. 5, fn. 1]; it does not revisit that decision – as it should have, in light of the court's subsequent disposition of Mr. Durand's ADA claims.

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), internal citations omitted.

Subsequent decisions have added remand, as the preferred remedy, where no federal claims remain – preferable to dismissal of the supplemental state claim or claims:

> . . . As many lower courts have noted, a remand generally will be preferable to a dismissal when the statute of limitations on [484 U.S. 343, 352] the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case. In such a case, a dismissal will foreclose the plaintiff from litigating his claims. . . .
>
> Even when the applicable statute of limitations has not expired, a remand may best promote the values of economy, convenience, fairness, and comity.

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351-353 (1988), internal citations omitted.

Plainly stated, the District Court dismissed on its merits the only claim that court held was not time-barred. Far from the "sure-footed" reading of state law sought by *Gibbs*, supra, *in state court*; the District Court disposed of Mr. Durand's emotional distress claim *without opinion*. To ascertain the District Court's reasoning, one must first obtain and read the transcript of 24 July 2006 hearing, on the City's Motion for Summary Judgment.

Mr. Durand's Arizona claim for emotional distress should not have been disposed of by summary

judgment in the District Court, but instead remanded to the appropriate Arizona court for further proceedings. 28 U.S.C. § 1367(c)(3).

Respectfully submitted,

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September, 2008

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL B. DURAND, an individual, Plaintiff-Appellant, v. CITY OF PHOENIX, a municipal corporation, Defendant-Appellee.	No. 06-16608 D.C. No. CV-04-02465-SRB MEMORANDUM* (Filed Mar. 25, 2008)

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Submitted March 18, 2008**

Before: CANBY, T.G. NELSON, and BEA, Circuit Judges.

Michael B. Durand appeals pro se from the district court's summary judgment for the City of Phoenix in his action alleging disability discrimination and intentional infliction of emotional distress. We have jurisdiction pursuant to 28 U.S.C. § 1291.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We review de novo, *Dark v. Curry County*, 451 F.3d 1078, 1082 n.2 (9th Cir. 2006), and we affirm.

The district court properly concluded that Durand's discrimination claims were time-barred, because Durand filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in July 2004, more than 180 days after his termination in early December 2003. *See* 42 U.S.C. § 2000e-5(e) ("A charge [of discrimination] shall be filed [with the EEOC] within one hundred and eighty days after the alleged unlawful employment practice occurred. . . . ").

The district court also properly concluded that the acts Durand complained of were not sufficiently extreme and outrageous to state a claim for relief for intentional infliction of emotional distress under Arizona law. *See Mintz v. Bell Atlantic Sys. Leasing Intern., Inc.*, 905 P.2d 559, 563 (Ariz. Ct. App. 1995) ("[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.").

We do not consider Durand's contentions raised for the first time on appeal. *See Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004) ("In general, we do not consider an issue raised for the first time on appeal.")

Durand's remaining contentions are unavailing.

We deny all pending motions.

AFFIRMED.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Michael B. Durand, an individual, Plaintiff, vs. City of Phoenix, a municipal corporation, Defendant.	No. CV-04-2465-PHX-SRB **ORDER**

This case involves federal employment discrimination claims and a state law claim of Intentional Infliction of Emotional Distress ("IIED"). At issue is Defendant City of Phoenix's Motion for Summary Judgment (Doc. 34.) For the reasons that follow, the motion is granted.

I. BACKGROUND

Plaintiff Michael B. Durand was employed by Defendant as a landfill equipment operator beginning in March 2000. He was terminated on December 12, 2003, allegedly on account of his age and disability, and in retaliation for prior conduct. Defendant claims that Plaintiff was not terminated because of his disability, age or in retaliation, but for other, legitimate reasons.

On July 19, 2004, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On August 17, 2004, the EEOC issued a notice of right to sue and advised Plaintiff that it was closing its file on Plaintiff's discrimination charge, stating, "[w]e cannot investigate your charge because it was not filed within the time limit required by law." (Def.'s Statement of Facts ("DSOF") ¶ 42 (citing Ex. B to Complaint).)

Plaintiff filed this suit on November 9, 2004, alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and IIED.[1]

II. LEGAL STANDARDS AND ANALYSIS

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to show an absence of genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, then the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). In deciding a motion for summary judgment,

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[1] At oral argument on July 24, 2006, the Court granted Defendant's motion related to Plaintiff's IIED claims.

the court views the evidence of the non-movant in the light most favorable to that party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255.

"Title VII claimants generally establish jurisdiction in federal court by first exhausting their EEOC administrative remedies." *Sosa v. Hiraoka,* 920 F.2d 1451, 1456 (9th Cir. 1990). The time limitations applicable to a Title VII claim are incorporated into the ADA. 42 U.S.C. § 12117. A plaintiff exhausts his administrative remedies "by filing a timely charge with the EEOC." *Vasquez v. County of Los Angeles,* 349 F.3d 634, 644 (9th Cir. 2003) (citing 42 U.S.C. § 2000e-5(b); *B.K.B. v. Maui Police Dep't,* 276 F.3d 1091, 1099 (9th Cir. 2002)). The statutory deadline for filing a discrimination charge with the EEOC is 180 days after the alleged violation. 42 U.S.C. § 2000e-5(e)(1). That time is extended to 300 days if the Plaintiff first files a charge with an appropriate state agency. *Id.*

Defendant argues that the 180 day time limit applies in this case because there is no evidence that Plaintiff filed a discrimination charge with an appropriate state agency. (Def.'s Mot. for Summ. J. ("MSJ") at 8.) If that is true, then the statute would bar any claim for acts that occurred before January 20, 2004. Defendant contends that if January 20, 2004 is the correct date, then all of Plaintiff's claims are barred because they arose from acts occurring by or before Plaintiffs December 12, 2003 termination. (MSJ at 8; DSOF ¶¶ 17-18, 39.)

Plaintiff's Response merely states that "Title VII requires a plaintiff raising claims of discrete discriminatory or retaliatory acts to file his EEOC charge within 300 days of the acts alleged in the charge." (Pl.'s Resp. at 10.) If Plaintiff had 300 days to file a charge, then the statute would bar any claims for acts that occurred before September 23, 2003. (Pl.'s Resp. at 10.) Plaintiff never claims that he filed a charge with an appropriate state agency. Rather, at oral argument, Plaintiff maintained that the 180-day deadline applies because Arizona is a "deferral" state and so a charge initially filed with the EEOC is subject to the 300-day deadline. Plaintiff cited no authority for this assertion.

Plaintiff misreads the statutory provision guiding this action. 42 U.S.C. § 2000e-5 states:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . , except that in a case of an unlawful employment practice with respect to which the person aggrieved *has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice* . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . .

42 U.S.C. 2000e-5(e)(1) (emphasis added). It is clear from the statute that Plaintiff had 180 days to file his charge with the EEOC unless he first filed a charge

with the appropriate state agency, in which case he would have 300 days. Plaintiff's citations do not persuade the Court otherwise. In *National Railroad Passenger Corporation,* for example, the Supreme Court said, "[i]n a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee *who initially files a grievance with that agency* must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days. A claim is time barred if it is not filed within these time limits." *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 109 (2002) (emphasis added).

The statute is clear that Plaintiff had 180 days to file his charge with the EEOC unless he first filed a charge with the appropriate state agency. Plaintiff presented no evidence that he filed a charge with a state agency. Therefore, Plaintiff needed to file his EEOC charge within 180 days of the alleged violation(s). Plaintiff's counsel agreed at oral argument that if 180 days is the relevant deadline, then all of Plaintiff's federal claims are barred. Accordingly, the Court grants Defendant's Motion for Summary Judgment.

IT IS ORDERED granting Defendant's Motion for Summary Judgment (Doc. 34).

DATED this 25th day of July, 2006.

/s/ Susan R. Bolton
Susan R. Bolton
United States District
Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MICHAEL B. DURAND, Plaintiff, vs. CITY OF PHOENIX, a municipal corporation, Defendant.	)	CIV 04-2465-PHX-SRB **JUDGMENT**

_____ **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS THEREFORE ORDERED AND ADJUDGED that the Court having granted Defendant's Motion for Summary Judgment, Plaintiff take nothing and the Complaint and this action are hereby dismissed.

Date: July 25, 2006

RICHARD H. WEARE
Clerk/DCE

S/ L. Dixon
(By) L. Dixon, Deputy Clerk

cc: all counsel

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL B. DURAND, an individual, Plaintiff-Appellant, v. CITY OF PHOENIX, a municipal corporation, Defendant-Appellee.	No. 06-16608 DC # 04-CV-02465 – SRB District of Arizona (Phoenix) ORDER (Filed May 12, 2008)

Before: CANBY, T.G. NELSON, and BEA, Circuit Judges

The Clerk shall file the petition for rehearing received on April 8, 2008.

The petition for panel rehearing is denied.

We deny the motions filed on April 8 and 29, 2008.

No further filings will be accepted in this closed case.

STATUTES INVOLVED

1. DISCRIMINATION

42 U.S.C. § 12112. [Section 102]

(a) General rule. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. – As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be jobrelated for the position in

question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) . Covered entities in foreign countries. –

(1) In general. – It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption. – If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. – This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. – For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on –

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries. –

(1) In general. – The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment. –

(A) Prohibited examination or inquiry. – Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. – A covered entity may make preemployment inquiries into the ability of an applicant to perform jobrelated functions.

(3) Employment entrance examination. – A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry. –

(A) Prohibited examinations and inquiries. – A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be jobrelated and consistent with business necessity.

(B) Acceptable examinations and inquiries. – A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform jobrelated functions.

(C) Requirement. – Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

2. REGULATIONS

42 U.S.C. § 12116. [Section 106]

Not later than 1 year after July 26, 1990 [the date of enactment of this Act], the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5 [United States Code].

3. ENFORCEMENT

42 U.S.C. § 12117. [Section 107]

(a) Powers, remedies, and procedures. – The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title [sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title [section 106], concerning employment.

(b) Coordination. – The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations,

and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990 [the date of enactment of this Act].

4. ENFORCEMENT PROVISIONS

42 U.S.C. § 2000e-5. [Section 706]

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704].

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including onthejob training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labormanagement committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such

form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with

respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e)(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a

charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its

discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person

would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 [of the United States Code], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g)(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title [section 704(a)].

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) The provisions of chapter 6 of title 29 [the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 105-115)] shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28 [United States Code].

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

5. 28 USC § 1367.

PART IV – JURISDICTION AND VENUE

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of

such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

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Attorney for Plaintiff Michael B. Durand

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MICHAEL B. DURAND, an individual,	) Case No. CV 04 2465 PHX SRB
Plaintiff,	) **COMPLAINT**
vs.	) **(Jury Trial Requested)**
CITY OF PHOENIX, a municipal corporation,	) (Filed Nov. 9, 2004)
Defendant.	)

Plaintiff, by and through his counsel, files his complaint and alleges as follows:

1. Plaintiff Michael B. Durand ("Plaintiff") is an individual, with his principal place of residence in Maricopa County, Arizona.

2. Upon information and belief, Defendant City of Phoenix ("Defendant") is a municipal corporation.

3. Upon information and belief, the City of Phoenix, at all times relevant to this case, was and is a resident of Maricopa County, Arizona.

4. The Defendant caused events to occur in Maricopa County, Arizona, out of which this action arises. The jurisdiction of this Court over the subject matter of this action is predicated on 42 U.S.C. § 2000e-5(f)(3), 42 U.S.C. § 12117(a), and 28 U.S.C. § 1331. The Court has personal jurisdiction over the parties hereto.

5. At all times relevant to this case, Defendant has continuously been an employer engaged in an industry affecting commerce under Section 101(5) of the Americans With Disabilities Act of 1990, as amended (the "ADA"), and 42 U.S.C. § 12111(7), which incorporates by reference Sections 701(g) and (h) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e(g) and (h).

6. Venue is proper in the District of Arizona, pursuant to 42 U.S.C. § 2000e-5(3), because the unlawful employment practices complained of herein occurred in the State of Arizona, and Defendant maintains a business office within this judicial district.

7. Plaintiff, age 57, was employed as a landfill operator for the Department of Public Works, a division of Defendant, beginning on or about March 20, 2000, and continuing until December 12, 2003.

8. On or about February 2003, Plaintiff was working for Defendant when he was confronted by an employee at Defendant's Skunk Creek Landfill. Plaintiff became upset as a result of the foregoing incident and left work for the day.

9. Plaintiff's physician sent a letter to Defendant regarding Plaintiff's medical condition of PTSD. In fact, Defendant was already aware at the time of the incident on or about February 2003 that Plaintiff suffered from PTSD.

10. When Plaintiff returned to work the following day, he reminded the foreman that Plaintiff suffered from PTSD and asked his supervisor, who worked for Defendant, to provide reasonable accommodations, including, but not limited to, keeping him away from the person who had confronted Plaintiff the previous day.

11. On or about September 1, 2003, Plaintiff was hospitalized for symptoms related to his PTSD.

12 Plaintiff returned to work on or about September 8, 2003, and was confronted and verbally assaulted by Gilbert Quanitana for a work-related accident in which Plaintiff was involved. Plaintiff left work and immediately returned to the hospital for treatment of his PTSD.

13. Plaintiff returned to work on or about September 11, 2003, at which time Defendant placed him on administrative leave, claiming that the work-related accident on September 8, 2003, was actually an assault by Plaintiff on another employee.

14. On or about October 17, 2003, Defendant placed Plaintiff on house arrest and informed him that he was not allowed on Defendant's property.

15. On or about December 11, 2003, Plaintiff filed a series of grievances (the "Grievances") against several of Defendant's employees for harassment, non-payment of wages, and discrimination on the basis of his disability.

16. Defendant terminated Plaintiff on December 12, 2003.

17. The Civil Service Division reinstated Plaintiff's employment on or about April 19, 2004.

18. On or about July 19, 2004, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") claiming discrimination on the basis of his disability, age, and retaliation by Defendant. The EEOC issued Plaintiff a right to sue letter on or about August 17, 2004.

19. Plaintiff timely served a Notice of Claim on Defendant on or about July 29, 2004, in compliance with Arizona Revised Statutes § 12-821.01, a true and correct copy of which is attached hereto as Exhibit C.

Count One

(Breach of 42 U.S.C. §§ 12101 - 12213 - Disability Discrimination)

20. Plaintiff realleges the foregoing allegations and incorporates them herein by this reference.

21. Plaintiff has been diagnosed by a treating physician with PTSD.

22. Plaintiff is a "qualified individual" as that term is defined in the Act, who was and is capable of performing the essential job functions of the employment position that she occupied at the time of her termination.

23. Plaintiff's disability is chronic in nature, and is a recognized physical disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, in that Plaintiff (1) has a physical or mental impairment that substantially limits one more major life activity, or (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

24. Defendant failed to provide reasonable accommodations for Plaintiff as required by the Act and terminated Plaintiff after he had requested that accommodations be made.

25. Defendant knew about Plaintiff's disability and intentionally terminated Plaintiff while he was receiving medical treatment for such disability, which constitutes a disparate impact and/or disparate treatment of Plaintiff in violation of the Act.

26. Plaintiff has filed a charge of discrimination with the EEOC, a true and correct copy of which is attached hereto as Exhibit A. Within ninety days of the filing of this Complaint, the EEOC has issued to Plaintiff a right to sue letter authorizing this Complaint, a true and correct copy of which is attached hereto as Exhibit B. Plaintiff has exhausted his administrative remedies.

27. As a direct and proximate result of Defendant's actions, Plaintiff has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress; and Plaintiff has suffered a loss of earnings and other employment benefits. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

28. Plaintiff is informed and believes, and based thereon alleges, that the conduct of Defendant, as described herein, was malicious and oppressive, and done with a conscious disregard of Plaintiff's rights and with the intent to injure Plaintiff, for which conduct Plaintiff is entitled to punitive damages.

Count Two

(Retaliation)

29. Plaintiff realleges the foregoing allegations and incorporates them herein by this reference.

30. Plaintiff has been diagnosed by a treating physician with PTSD, of which fact Defendant is fully aware.

31. Plaintiff informed Defendant, personally and through his treating physician, that he suffered from PTSD, and requested that Defendant make reasonable accommodations for his medical condition.

32. Plaintiff engaged in various protected activities while employed by Defendant, including,

but not limited to, getting treatment for his medical condition, filing grievances against persons working for Defendant who had engaged in apparent discrimination and harassment, and demanding that payment of his wages be made.

33. In apparent retaliation for Plaintiff engaging in protected activities, Defendant placed Plaintiff on administrative leave, prohibited him from going onto Defendant's property, refused to timely pay earned wages, and terminated Plaintiff.

34. Defendant's conduct as described herein constitutes unlawful retaliation for Plaintiff seeking to engage in protected activities and seeking to enforce his right to be free from discrimination on the basis of disability, which conduct violates the Act.

Count Three

(Violation of the Rehabilitation Act)

35. Plaintiff realleges the foregoing allegations and incorporates them herein by this reference.

36. Plaintiff has been diagnosed by a treating physician with PTSD, of which fact Defendant is fully aware.

37. Plaintiff is a "qualified individual" as that term is defined in the Act, who was and is capable of performing the essential job functions of the employment position that she occupied at the time of her termination.

38. Plaintiff's disability is chronic in nature, and is a recognized physical disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, in that Plaintiff (1) has a physical or mental impairment that substantially limits one more major life activity, or (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

39. Defendant failed to provide reasonable accommodations for Plaintiff as required by the Act and terminated Plaintiff after he had requested that accommodations be made.

40. Defendant knew about Plaintiff's disability and intentionally terminated Plaintiff while he was receiving medical treatment for such disability, which constitutes a disparate impact and/or disparate treatment of Plaintiff in violation of the Act.

41. In apparent retaliation for Plaintiff engaging in protected activities, Defendant placed Plaintiff on administrative leave, prohibited him from going onto Defendant's property, refused to timely pay earned wages, and terminated Plaintiff.

42. Defendant's conduct as described herein constitutes unlawful retaliation for Plaintiff seeking to engage in protected activities and seeking to enforce his right to be free from discrimination on the basis of disability, which conduct violates Section 504 of the Rehabilitation Act.

Count Four

(Intentional Infliction of Emotional Distress)

43. Plaintiff realleges the foregoing allegations and incorporates them herein by this reference.

44. Defendant, through its employees, agents and principals, intentionally retaliated against Plaintiff for engaging in protected activities, placed Plaintiff on administrative leave, prohibited him from going onto Defendant's property, refused to timely pay earned wages, and terminated Plaintiff, which conduct constituted harassment, deprivation of civil rights, and which conduct caused Plaintiff to feel humiliation, embarrassment, and to suffer emotional distress.

45. Defendant knew or should have known that its conduct was repulsive, shocking and harassing to Plaintiff, yet Defendant, acting by and through its agents and employees, did not take the appropriate action to intervene and prevent its employees and agents from further engaging in such conduct, thereby intentionally ratifying and participating in the conduct.

46. Defendant's conduct, by and through its employees and agents, was extreme and outrageous, Defendant intended to cause emotional distress or recklessly disregarded the likelihood that Plaintiff would be distressed from the conduct of the employees and agents, and the said conduct did cause severe emotional distress.

47. As a proximate and legal cause of such outrageous and intentional conduct, Plaintiff has sustained damages, including, but not limited to, pain, discomfort, suffering, disability, emotional distress, humiliation, anxiety, and other special and general damages, all to be proven at trial.

WHEREFORE, Plaintiff prays for a trial by jury and for judgment as against the Defendant as follows:

A. Compensatory damages in an amount to be proven at trial;

B. Back pay from the time Plaintiff was terminated;

C. Interest on all unpaid sums at the legal rate, including pre-judgment interest on all liquidated damages, until fully satisfied;

D. Punitive damages;

E. Their legal costs, including attorneys' fees and expenses;

F. Post-judgment interest on fees and costs at the legal rate, and

G. Such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 9th day of November, 2004.

LAW OFFICE OF
ROBERT M. GREGORY, P.C.

By: /s/ Robert M. Gregory
Robert M. Gregory
Attorney for Plaintiff

[SEAL]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(602) 640-5000
TTY (602) 640-5072
FAX (602) 640-5009

Michael B. Durand
7299 Bent Creek Drive
Temperance, Michigan 48182

Re: Freedom of Information Act Request
FOIA Number: A8-07-FOIA-053-PH

Dear Mr. Durand:

Your May 1, 2008, request under the Freedom of Information Act (FOIA), for the latest copy of the Worksharing Agreement between the Arizona Civil Rights Division and the EEOC was received in the office of the Regional Attorney on May 1, 2008.

Attached is a copy of the Worksharing Agreement between the Arizona Attorney General's Office of the Civil Rights Division and the U.S. Equal Employment Opportunity, Phoenix District Office signed on October 4, 2007. Since this is a public record, your request is *granted in full.*

Respectfully,

/s/ Sally Shanley
Sally C. Shanley
Supervisory Trial Attorney

Mary Jo O'Neill
Regional Attorney

5/27/08
Date

SCS/MJO/bjt

Attachment

WORKSHARING AGREEMENT BETWEEN ARIZONA ATTORNEY GENERAL'S OFFICE CIVIL RIGHTS DIVISION and THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PHOENIX DISTRICT OFFICE FOR FISCAL YEAR 2008

I. INTRODUCTION

A. The Arizona Civil Rights Division, hereinafter referred to as the ACRD or Division, has jurisdiction over allegations of employment discrimination filed against employers with 15 or more employees, one or more for sexual harassment, occurring within the State of Arizona based on race, color, religion, sex, national origin, age, or disability pursuant to Section 41-1401 *et.seq.* of the Arizona Revised Statutes (the "Arizona Act").

The U.S. Equal Employment Opportunity Commission, hereinafter referred to as the EEOC, has jurisdiction over allegations of employment discrimination occurring throughout the United States where such charges are based on race, color, religion, sex, or national origin, all pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e)) (hereinafter referred to as Title VII). The EEOC has jurisdiction to investigate and determine charges of discrimination based on age (40 or

older) under the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 621 et.seq.) (ADEA), for unequal wages based on sex under the Equal Pay Act of 1963, as amended (29 U.S.C. § 206) (EPA), and over allegations of employment discrimination based on disability pursuant to Title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. § 12101) (ADA).

B. In recognition of, and to the extent of the common jurisdiction and goals of the two (2) Agencies, and in consideration of the mutual promises and covenants contained herein, the FEPA and the EEOC hereby agree to the terms of this Worksharing Agreement, which is designed to provide individuals with an efficient procedure for obtaining redress for their grievances under appropriate State and Federal laws.

II. FILING OF CHARGES OF DISCRIMINATION

A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially receives the charges. The EEOC's receipt of charges on the FEPA's behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706(c) and (e)(1) of Title VII. This delegation of authority to receive charges does not include the

right of one Agency to determine the jurisdiction of the other Agency over a charge. Charges can be transferred from one agency to another in accordance with the terms of this agreement or by other mutual agreement.

B. The FEPA shall take all charges alleging a violation of Title VII, the ADEA, the EPA, or the ADA where both the FEPA and the EEOC have mutual jurisdiction, or where the EEOC only has jurisdiction, so long as the allegations meet the minimum requirements of those Acts, and for charges specified in Section III. A. 1. below, refer them to the EEOC for initial processing.

C. Each Agency will inform individuals of their rights to file charges directly with the other Agency and or assist any person alleging employment discrimination to draft a charge in a manner that will satisfy the requirements of both agencies to the extent of their common jurisdiction.

Normally, once an agency begins an investigation, it resolves the charge. Charges may be transferred between the EEOC and the FEPA within the framework of a mutually agreeable system. Each agency will advise Charging Parties that charges will be resolved by the agency taking the charge except when the agency taking the charge lacks jurisdiction or when the charge is to be transferred in accordance with Section III

(DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES).

D. For charges that are to be dual-filed, each Agency will use EEOC Charge Form 5 (or alternatively, an employment discrimination charge form which within statutory limitations, is acceptable in form and content to the EEOC and the FEPA) to draft charges. When a charge is taken based on disability, the nature of the disability shall not be disclosed on the face of the charge.

E. Within ten calendar days of receipt, each Agency agrees that it will notify both the Charging Party and the Respondent of the dual-filed nature of each such charge it receives for initial processing and explain the rights and responsibilities of the parties under the applicable Federal, State, or Local statutes.

III. DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES

In recognition of the statutory authority granted to the FEPA by Section 706(c) and 706(d) of Title VII as amended; and by Title I of the Americans with Disabilities Act, and the transmittal of charges of age discrimination pursuant to the Age Discrimination in Employment Act of 1967, the primary responsibility for resolving charges between the FEPA and the EEOC will be divided as follows:

A. The EEOC and the FEPA will process all Title VII, ADA, and ADEA charges that they originally receive.

1. For charges originally received by the EEOC and/or to be initially processed by the EEOC, the FEPA waives its right of exclusive jurisdiction to initially process such charges for a period of 60 days for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day.

2. In addition, the EEOC will initially process the following charges:

– All charges where the discrimination occurred in the counties of Apache, La Paz, Mohave, Navajo, and Yuma;

– All charges where the discrimination occurred in Maricopa County except as noted in Section II, Paragraph C.

– All Title VII, ADA, and concurrent Title VII/ADA charges jurisdictional with the FEPA and received by the FEPA 240 days or more after the date of violation;

– All disability-based charges that may not be resolved by the FEPA in a manner consistent with the ADA.

– All concurrent Title VII/EPA charges;

– All charges against the FEPA and all charges against agencies of the State of Arizona;

– All Civil Rights Act of 1991 §321 charges, previously exempt State Employees;

– All charges were [sic] there exists a conflict of interest with ACRD;

– All charges filed by EEOC Commissioners;

– Charges also covered by the Immigration Reform and Control Act;

– Complaints referred to the EEOC by the U.S. Department of Justice, Office of Federal Contract Compliance Programs, or Federal fund-granting agencies under 29 CFR § 1640, 1641, and 1691 and class complaints retained by these agencies for action;

– Any charge where the EEOC is a party to a Conciliation Agreement or a Consent Decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The EEOC will notify the FEPA of all Conciliation Agreements and Consent Decrees that have features relevant to the disposition of subsequent charges;

– Any charge alleging retaliation for filing a charge with the EEOC or for cooperating with the EEOC; and

– All charges against Respondents that are designated for initial processing by

the EEOC in a supplementary memorandum to this Agreement.

– All charges identified by EEOC for Strategic Enforcement and Litigation Program (SELP), unless previously identified by ACRD for special enforcement.

3. The FEPA will initially process the following types of charges:

– All charges where the discrimination occurred in the counties of Cochise, Graham, Greenlee, Pima, Pinal, and Santa Cruz;

– Any charge alleging retaliation for filing a charge with the FEPA or cooperating with the FEPA;

– Any charge where the FEPA is a party to a Conciliation Agreement or a Consent Decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The FEPA will provide the EEOC with an on-going list of all Conciliation Agreements and Consent Decrees that have features relevant to the disposition of subsequent charges;

– All charges that allege more than one basis of discrimination where at least one basis is not covered by the laws administered by the EEOC but is covered by the FEPA Ordinance, or where the EEOC is mandated by federal court decision or by internal administrative

EEOC policy to dismiss the charge, but the FEPA can process that charge.

– All charges against Respondents that are designated for initial processing by the FEPA in a supplementary memorandum to this Agreement; and

– All disability-based charges against Respondents over which the EEOC does not have jurisdiction.

B. EEOC and ACRD agree that for receiving and investigating charges of discrimination which occur in the counties of Coconino, Gila, and Yavapai, the agencies will share jurisdiction. ACRD will be responsible for taking and investigating any charge from these counties when the original inquiry is initiated at its offices, and EEOC will be responsible for any charge from these counties when the original inquiry initiated at its office.

C. ACRD agrees to receive and process up to fifty (50) charges per month where the discrimination occurs in Maricopa County. Each month at the time ACRD receives fifty (50) charges to process, it will notify the Supervisor of EEOC's Charge Receipt and Technical Information Unit or a designated person(s) that it will begin referring subsequent inquiries received during the remainder of the month to EEOC.

D. Notwithstanding any other provision of the Agreement, the FEPA or the EEOC may request to be granted the right to initially process any charge subject to agreement of the other agency. Such variations shall not be inconsistent with the objectives of this Worksharing Agreement or the Contracting Principles.

E. Each Agency will on a quarterly basis notify the other of all cases in litigation and will notify each other when a new suit is filed. As charges are received by one Agency against a Respondent on the other Agency's litigation list a copy of the new charge will be sent to the other Agency's litigation unit within 15 working days.

IV. EXCHANGE OF INFORMATION

A. Both the FEPA and the EEOC shall make available for inspection and copying to appropriate officials from the other Agency any information that may assist each Agency in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, investigative files, conciliation agreements, staffing information, case management printouts, charge processing documentation, and any other material and data as may be related to the processing of dual-filed charges or administration of the contract. The Agency accepting information agrees to comply with any confidentiality requirements imposed on the agency providing

the information. With respect to all information obtained from the EEOC, the FEPA agrees to observe the confidentiality provisions of Title VII, the ADEA, and the ADA.

B. In order to expedite the resolution of charges or facilitate the working of this Agreement, either Agency may request or permit personnel of the other Agency to accompany or to observe its personnel when processing a charge.

V. RESOLUTION OF CHARGES

A. Both agencies will adhere to the procedures set out in the EEOC's State and Local Handbook, including current revisions thereto.

B. For the purpose of according substantial weight to the FEPA final finding and order, the FEPA must submit to the EEOC copies of all documents pertinent to conducting a substantial weight review; the evaluation will be designed to determine whether the following items have been addressed in a manner sufficient to satisfy EEOC requirements; including, but not limited to:

1. jurisdictional requirements,

2. investigation and resolution of all relevant issues alleging personal harm with appropriate documentation and using proper theory,

3. relief, if appropriate,

4. mechanisms for monitoring and enforcing compliance with all terms of conciliation agreements, orders after public hearing or consent orders to which the FEPA is a party.

C. In order to be eligible for contract credit and/or payment, submissions must meet all the substantive and administrative requirements as stipulated in the Contracting Principles.

D. For the purposes of determining eligibility for contract payment, a final action is defined as the point after which the charging party has no administrative recourse, appeal, or other avenue of redress available under applicable State and Local statutes.

VI. IMPLEMENTATION OF THE WORKSHARING AGREEMENT

A. Each agency will designate a person as liaison official for the other agency to contact concerning the day-to-day implementation for the Agreement. The liaison for the FEPA will be Diana Varela. The liaison official for the EEOC will be Cherrie Y. Martin.

B. The agencies will monitor the allocation of charge-processing responsibilities as set forth in the Agreement. Where it appears that the overall projection appears inappropriate, the appropriate portions of this Agreement will be modified to ensure full utilization of the investigation and resolution capacities of the FEPA and rapid redress for

allegations of unlawful employment discrimination.

C. The EEOC will provide original forms to be copied by the FEPA, in accordance with the Regulations and the Compliance Manual to be used by the FEPAs in correspondence with Charging Parties and Respondents.

D. If a dispute regarding the implementation or application of this agreement cannot be resolved by the FEPA and District Office Director, the issues will be reduced to writing by both parties and forwarded to the Director of the Office of Field Programs for resolution.

E. This Agreement shall operate from the first day of October 2007 to the thirtieth day of September 2008 and may be renewed or modified by mutual consent of the parties.

I have read the foregoing Worksharing Agreement and I accept and agree to the provisions contained therein.

Date 10/4/07 /s/ Chester V. Bailey
CHESTER V. BAILEY,
District Director
U.S. Equal Employment
Opportunity Commission
Phoenix District Office

Date 10/4/07 /s/ Melanie V. Pate
MELANIE V. PATE,
Division Chief Counsel
Arizona Civil Rights Division
Phoenix, Arizona

[SEAL] **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(602) 640-5000
TTY (602) 640-5072
FAX (602) 640-5071

TIME LIMITS FOR FILING A CHARGE OF DISCRIMINATION
ARIZONA AND UTAH ONLY

You are required to file a charge of discrimination with EEOC and receive a Notice of Right to Sue before you may pursue a claim of discrimination in federal court under:

- Title VII of the Civil Rights Act of 1964 ("Title VII") – 15 or more employees
- The Age Discrimination in Employment Act ("ADEA") – 20 or more employees
- The Americans with Disabilities Act ("ADA") – 15 or more employees

Under the Equal Pay Act ("EPA"), you do not have to file a charge with EEOC in order to have the right to go to court. However, since many EPA claims also raise Title VII sex-based wage discrimination issues, it may be advisable to file charges under both laws in a timely manner.

The following information will help you determine the requirements for filing a timely charge with EEOC in your state and with your issues. ***Please inform us***

immediately if you are near the deadline for filing a charge of discrimination.

Arizona

- ✓ In general, you have ***300 days*** from the last date of harm to file a charge with EEOC.
- ✓ However, under the following conditions, you have only ***180 days*** to file a charge:
  - → Sexual harassment if the employer has 1-14 employees.
  - → If you are a State or local government political appointee.

Utah

- ✓ In general, you have ***300 days*** from the last date of harm to file a charge with EEOC.
- ✓ However, under the following conditions, you have only ***180 days*** to file a charge:
  - → Age claims if the employer has 15-19 employees.
  - → Discrimination due to race, sex, color, religion, national origin, Title VII retaliation or ADA retaliation, if the employer is a state or local government agency with less than 15 employees.
  - → Disability discrimination related to:
    - Disability inquiries and medical examinations of employees,
    - Confidentiality of medical records,

- Discrimination through a contract, and/or
- Evaluating safety requirements.

Special Information for Age or Disability Claims Against a State Government Employer in Arizona or Utah

✓ Such charges need to be filed with EEOC, or the Arizona Civil Rights Division (ACRD) or the Utah Antidiscrimination Labor Division (UALD) within ***180 days*** of the date of harm to protect all of your rights.

✓ Such charges filed ***between 181 and 300 days*** from the date of harm will be accepted by EEOC, but you may not be entitled to monetary relief.

Special Information for National Origin and Citizenship Claims in Arizona and Utah

✓ The following types of charges must be filed within ***180 days*** of the date of harm and will be referred to the U.S. Department of Justice for processing:

→ A charge of discrimination in hiring, discharge, recruitment, or referral for a fee due to National Origin or Retaliation for protesting National Origin discrimination against an employer with 4-14 employees, and/or

→ A charge of Citizenship discrimination against an employer with 4 or more employees.

The LEAD Initiative

About LEAD

LEAD Home

Why do we need the LEAD Initiative?

Federal Disability Laws enforced by the EEOC

LEAD Update

LEAD Program Tips

LEAD Resources

Have a Question?

Contact us by email at Lead.Initiative@eeoc.gov.

LEAD (Leadership for the Employment of Americans with Disabilities) is the EEOC's initiative to address the declining number of employees with targeted disabilities in the federal workforce. The goal for this initiative is to significantly increase the population of individuals with severe disabilities employed by the

federal government. Please check the LEAD Update link for information on past and future events.

This national outreach and education campaign seeks to:

- reverse the trend of decreasing participation in federal employment
- increase the awareness of hiring officials about the declining numbers of people with disabilities in federal employment
- educate federal hiring officials about how to use special hiring authorities to bring people with disabilities on board, particularly those with severe disabilities
- educate applicants with severe disabilities about how to apply using the special hiring authorities available; and
- supply information and *resources* on recruitment, hiring, and providing reasonable accommodations.

Please note that the LEAD initiative is not an employment program. Rather, LEAD staff is working to encourage federal agencies to hire and advance more individuals with severe disabilities. Thus, LEAD is not directly involved with individual hiring decisions. For information on current vacancies in the federal government, please visit www.usajobs.opm.gov, and/or the website of individual federal agencies. Additionally, job seekers may find useful information

on the OPM Disability Resource page – http://www.opm.gov/disability/.

This page was last modified on September 4, 2007.

New Freedom Initiative

On February 1, 2001, President George W. Bush announced his New Freedom Initiative to promote the full integration of people with disabilities into all aspects of American life. The goals of this comprehensive plan include expanding educational and employment opportunities; increasing access to assistive technologies and public accommodations; and providing accessible transportation and housing options for individuals with disabilities.

The New Freedom Initiative builds upon the progress made by the Americans with Disabilities Act of 1990 (ADA) in protecting the civil rights of approximately 54 million Americans with disabilities. The Equal Employment Opportunity Commission has taken a lead role in implementing the employment goals of the Initiative.

EEOC has implemented a number of activities as part of President Bush's New Freedom Initiative, including the following:

- **Free workshops**
  EEOC may be able to provide free ADA workshops in our area for small businesses and individuals with disabilities. These workshops, which include information on tax incentives, community resources, and the rights and responsibilities of employers and employees, are aimed at encouraging businesses with 15 to 100 employees to hire

individuals with disabilities and assisting individuals who are entering the workforce to understand the ADA.

- **Outreach speakers**
  In addition to ongoing ADA outreach activities, EEOC also offers free outreach speakers for various types of events for individuals with disablilites [sic] and employers. If you are conducting a conference or activity for individuals with disabilities, EEOC will work with you to provide a speaker at your event.

- **Corporate Leadership Conferences**
  We will work with you to hold a corporate leadership conference to advance the hiring of people with disabilities in your region.

- **States' Best Practices Project**
  EEOC initiated a partnership with several states to promote the hiring of people with disabilities in state government jobs. In addition to reviewing each state's practices with respect to hiring, retention, advancement, and reasonable accommodation, the Commission has and will provide consultation, outreach and technical assistance to the participating states. EEOC issued a final report highlighting best practices and outlining barriers uncovered. The four states covered in the interim report – Florida, Maryland, Vermont, Washington – were joined by Kansas, Missouri, New Hampshire, New Mexico, and Utah in the October 2005 final report.

- Final Report on Best Practices For the Employment of People with Disabilities In State Government (October, 2005)
- Interim Report – States' Best Practices Project (October, 2004)

In addition, we have developed the following:

- Reasonable Accommodation for Attorneys With Disabilities
- The Americans with Disabilities Act: A Primer for Small Business
- *Telework fact sheet* which uses a step-by-step approach to explain how employers might consider allowing an individual to work from home as a reasonable accommodation.
- Job Applicants and the Americans with Disabilities Act
- How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers

and **Questions and Answers About:**

- Health Care Workers and the Americans with Disabilities Act
- Deafness and Hearing Impairments in the Workplace and the Americans with Disabilities Act
- Blindness and Vision Impairments in the Workplace and the ADA

- The Association Provision of the Americans with Disabilities Act
- Diabetes in the Workplace and the ADA
- Epilepsy in the Workplace and the ADA
- Persons with Intellectual Disabilities in the Workplace and the ADA
- Cancer in the Workplace and the ADA

EEOC's New Freedom Initiative Outreach:

- EEOC Chair Cari M. Dominguez receives the Charles M. Best Medal
- EEOC Chair's remarks at the American Diabetes Association meeting *June 13, 2003*
- EEOC Chair's remarks at the National Federation of the Blind Annual Convention *July 3, 2003*

To learn more about the New Freedom Initiative, see:

- President Bush's New Freedom Initiative
- DisabilityInfo.Gov: Web portal to the New Freedom Initiative

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This page was last modified on November 9, 2007.

U.S. Department of Labor **[SEAL]**

Employment Standards Administration
Office of Federal Contract
Compliance Programs
71 Stevenson Street, Suite 1700
San Francisco, CA 94105

Michael B. Durand
P.O. Box 12461
Glendale, AZ 85318

AUG -6 2004

Re: Complaint against:
City of Phoenix, Public Works Dept.

Dear Mr. Durand:

We have received your complaint filed against the City of Phoenix, Public Works Department, located at 200 West Washington St., Phoenix, AZ 85003. You are alleging that you were discriminated against because of your disability and your status as a special disabled veteran. Your allegations fall within the provisions of Section 503 of the Rehabilitation Act of 1973, as amended and 38 U.S.C. 4212.

The Office of Federal Contract Compliance Programs (OFCCP), administers the above Order, however, this agency has not been able to establish jurisdiction over your employer. Jurisdiction is based upon your employer having a Federal Contract in the amount of at least 25,000 dollars.

Therefore, we are sending your complaint to the following Equal Employment Opportunity Commission Office (EEOC). The EEOC does not

require a Federal contract in order to establish jurisdiction. We have date stamped the complaint to show which date we received it. If you have any additional questions, you may contact:

Susan Grace
Acting District Director
Equal Employment Opportunity Commission
3300 North Central Ave., Suite 690
Phoenix, AZ 85012-1848
(602) 640-5000

Sincerely,

/s/ [Illegible] K Huaga
[For] WOODY GILLILAND
Regional Director
Pacific Region

(Received Jul. 19, 2004)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: ☐ FEPA ☒ EEOC

Agency(ies) Charge No(s): 350-2004-04643

Arizona Civil Rights Division
and EEOC
State or local Agency, if any

Name (*Indicate Mr., Ms., Mrs.*)
Mr. Michael B. Durand

Home Phone No. (*Incl. Area Code*)
(xxx) xxx-xxxx

Date of Birth
xx-xx-xxxx

Street Address City, State and ZIP Code
xxxxx, xxxxx, xx xxxxx

Named Is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name
City of Phoenix (Public Works)

No. Employees, Members
500 or More

Phone No. (*Include Area Code*)
(602) 262-7109

Street Address City, State and ZIP Code
3165 W. Happy Valley Road, Phoenix, AZ 85027

Name

No. Employees, Members

Phone No. (*Include Area Code*)

Street Address City, State and ZIP Code

DISCRIMINATION BASED ON
(*Check appropriate box(es).*)
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION
☐ NATIONAL ORIGIN ☒ RETALIATION ☒ AGE
☒ DISABILITY ☐ OTHER (*specify below.*)

DATE(S) DISCRIMINATION TOOK PLACE
Earliest Latest
12-12-2003
☐ CONTINUING ACTION

the particulars are (*if additional paper is needed, attach extra sheet(s)*):

On September 10, 2003, I was placed on paid administrative leave for an incident with a co-worker. Subsequently, I was terminated from my position of Landfill Equipment Operator on December 12, 2003. I had been employed since March 20, 2000. I was also denied an accommodation request that I had submitted from my doctor.

I believe I have been discriminated against and retaliated against because of my age, 57, in violation

of the Age Discrimination in Employment Act and in violation of the Americans with Disabilities Act of 1990, as amended.

I want this charge filed with both the EEOC and the State or Local Agency, if any, I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty or perjury that the above is true and correct.

Jul 19, 2004	/s/ Michael B. Durand
Date	*Charging Party Signature*

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

[LOGO]

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(602) 640-5000
TTY (602) 640-5072
FAX (602) 640-5071

Michael B. Durand
P.O. Box 12461
Glendale, AZ 85318

RE: 350-2004-04643
Durand v. City of Phoenix
(Public Works)

Dear Mr. Durand:

On August 17, 2004, the Phoenix District Office of the Equal Employment Opportunity Commission issued a Dismissal and Notice of Rights for the above noted charge. Due to a typographical error, the charge number on that document was incorrect. It should have been 350-2004-04643, rather than 350-2004-04634. This letter serves to notify you of this error but does not alter your rights to file suit in Federal District Court as described in the Dismissal and Notice of Rights.

Sincerely,

8/26/04
Date

/s/ Susan L. Grace
Susan L. Grace
Acting District Director

cc: City of Phoenix

Aug. 26, 2004

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

[LOGO]

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(602) 640-5000
TTY (602) 640-5072
FAX (602) 640-5071

Mr. Michael B Durand
P O Box 12461
Glendale, AZ 85318

Subject: Dismissal of Charge

Charge Number: 350-2004-04634 NG

Dear Mr Durand:

We have completed a preliminary review of your case. At this time, the information in the file does not indicate that any further investigation of your case would necessarily result in any finding of discrimination. Consequently, we have decided that the Equal Employment Opportunity Commission (EEOC) will not investigate this case any further. This letter, and the enclosed documents, will dismiss your case from further action by the EEOC.

This dismissal is not a statement on the merits of your case. You still have rights under Federal law to privately pursue this matter in Federal Court. We have enclosed a Dismissal and Notice of Right to Sue form with this letter. This form will explain your rights. Please note that *you have only 90 days from*

the date that delivery of the Notice was ***attempted*** *at your last known address of record of 90 days of receipt of the Notice, whichever is earlier, to file suit in Federal Court, or you will lose your right to file a lawsuit against the respondent named in your charge.*

Sincerely,

AUG 17 2004
Date

/s/ Dale Rucker
Dale Rucker
Enforcement Supervisor

Enclosure

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Michael B Durand P O Box 12461 Glendale, AZ 85318	From: EEOC, Phoenix District Office 3300 N Central Ave – Ste 690 Phoenix, AZ 85012

[ ] *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No.	EEOC Representative	Telephone No.
350-2004-04634, NG	David Rucker – Supervisor	(602) 640-5055

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

[ ] The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

[ ] Your allegations did not involve a disability that is covered by the Americans with Disabilities Act.

[ ] The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

[ ] We cannot investigate your charge because it was not filed within the time limit required by law.

[ ] Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

[ ] While reasonable efforts were made to locate you, we were not able to do so.

[ ] You had 30 days to accept a reasonable settlement offer that afforded full relief for the harm you alleged.

[X] The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

[ ] The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this

[ ] Other *(briefly state)* _____

– NOTICE OF SUIT RIGHTS –
(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your

lawsuit **must be filed *WITHIN 90 DAYS* from your receipt of this Notice**; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred *more than 2 years (3 years)* before you file suit may not be collectible.**

On behalf of the
Commission

/s/ Susan L. Grace
Susan L. Grace,
Acting District Director

AUG 17 2004
(Date Mailed)

Enclosure(s)

cc: City of Phoenix – Public Works
City of Phoenix – Carole Henry

[LOGO]

City of Phoenix
PUBLIC WORKS DEPARTMENT

Last Chance Agreement

This agreement is being executed between the City of Phoenix (City) and Michael Durand (Durand) pursuant to the April 19, 2004 order of the Civil Service Board. By this agreement, the parties do not waive or forfeit any rights provided by the Charter, Personnel Rules, any existing Memorandum of Understanding, or provided by law.

1. Durand agrees to contact the City's Employee Assistance Coordinator within thirty days of returning to work, and to participate in counseling recommended by the City's Employee Assistance Coordinator.

2. Durand understands that demonstrating any violent or threatening behavior as defined by AR 2.325 towards another employee, supervisor, manager, customer or resident, will result in termination of his employment.

3. Durand and the City agree that this agreement shall remain in effect for sixty (60) months from the date it is signed by the parties.

Employee's Signature:	Michael B. Durand	Date: 10/15/04
Witness:	[Illegible]	Date: 10/15/04
Department Head:	[Illegible]	Date: 10/26/04

Original: Department Personnel File

Copies: Michael Durand
Dale Norris
Employee Assistant Coordinator
Personnel Department File

[Handwritten notation –
Mr. Norris,
Mr. Durand will receive his copy when he returns to work on November 15.
/s/ Lisa Esquivil]

101 South Central Avenue, Suite [Illegible]
Phoenix, Arizona 85004
602-256-5600 FAX: 602 534-1[Illegible]

Recycled Paper

CHARGE OF DISCRIMINATION	Charge Presented to:	Agency(ies) Charge No(s):
This form is affected by the Privacy Act of 1974, See enclosed Privacy Act Statement and other information before completing this form.	☐ FEPA ☒ EEOC	350-2005-02449

Arizona Civil Rights Division and EEOC
State or local Agency, if any

Name (*Indicate Mr., Ms., Mrs.*)	Home Phone No. (*Inc. Area Code*)	Date of Birth
Mr. Michael B. Durand	(xxx) xxx-xxxx	xx-xx-xxxx

Street Address	City, State and ZIP Code
xxxxx, xxxxx, xx xxxxx	

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. (*Include Area Code*)
City of Phoenix (Public Works)	500 or More	(602) 262-4661

Street Address	City, State and Zip Code
135 N. 2nd Avenue, 6th Floor, Phoenix AZ 85003	

Name	No. Employees, Members	Phone No. (*Include Area Code*)
City of Phoenix (Civil Service Board)		

Street Address	City, State and Zip Code

DISCRIMINATION BASED ON (*Check appropriate box(es).*)	DATE(S) DISCRIMINATION TOOK PLACE
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☒ RETALIATION ☒ AGE ☒ DISABILITY ☐ OTHER (*specify below.*)	Earliest — Latest 03-22-2005 ☒ CONTINUING ACTION

THE PARTICULARS ARE (*if additional paper is needed, attach extra sheet(s)*):

Personal Harm: During my tenure the City has harassed and intimidated me due to my age and disability. As part of that harassment, I was terminated on December 12, 2003. I was reinstated, but I was still placed within the same harassing and intimidating environment. I have repeatedly asked them to reasonable accommodate me due to my disability. I have been more than cooperative with the City, but they have refused to participate or engage into the resolution of my prior and pending issues. I believe the City has failed to address my age and disability related issues which included, but are not limited to, their hiring, firing, promotion and administration of wage, e g. cost of living. Most recently on October 15, 2004, the Civil Service Board tried to issue me a Last Change Agreement, which I felt was retaliatory, after I served 240 hour suspension. Subsequently due to my disability, I have been on a medical leave of absence. However, to my knowledge once I return to work I will be transferred to a different facility. The City has repeatedly overlooked the issues at the Skunk Creek Landfill facility where my problems began. Now once I return to work, they wish to transfer me to a different

facility instead of dealing with the issue. In addition I have repeatedly asked the Union for help and have filled nine (9) grievances with them, but to no avail. They fail to represent me, the employee interests, nor have they taken seriously my grievances. I believe the Union continues to side with the City and the Civil Service Board. The Union continues to deny my rights as an employee to Union representation.

On November 9, 2004, I filed a civil law suit in Federal Court against the employer. Prior to my filing I filed two charges of discrimination with the EEOC alleging discrimination due to my age and disability which included retaliation claims.

Statement of Discrimination: I believe I have been discriminated against due to my disability and retaliated against in violation of the Americans with Disabilities Act of 1990. In addition I believe I have been discriminated against because of my age and retaliated against in violation of the Age Discrimination in Employment Act of 1967.

I want this charge filed with both the EEOC and the State or local Agency, if any, I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY – *When necessary for State and Local Agency Requirement* I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
I declare under penalty of perjury that the above is true and correct. Mar 25, 2005 /s/ Michael B. Durand *Date* *Charging Party Signature*	SIGNATURE OF COMPLAINANT SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (*month, day, year*)

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(2)

Supreme Court, U.S.
FILED
OCT 2 - 2008
OFFICE OF THE CLERK

No. 08-335

IN THE

Supreme Court of the United States

MICHAEL B. DURAND,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

BRADLEY D. GARDNER
Counsel of Record
DAVID R. SCHWARTZ
UDALL, SHUMWAY & LYONS, P.L.C.
30 W. First Street
Mesa, Arizona 85201
(480) 461-5300

Attorneys for Respondent

218490

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals correctly dismissed a claim under the Americans with Disabilities Act because the charge of disability discrimination and retaliation was filed with the EEOC more than 180 days after Petitioner's termination, and there was no evidence of a filing with a State or local agency with authority to investigate and remedy the alleged unlawful employment practices?

2. Whether the Ninth Circuit Court of Appeals should have ruled on the merits of Petitioner's state law intentional infliction of emotional distress claim? Whether this issue should be considered because it was raised for the first time in the Petition for Writ of Certiorari?

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STATEMENT OF THE CASE

The Statement of the Case presented by Petitioner Michael Durand ("Petitioner") does not accurately describe the proceedings below. Also, it is filled with a myriad of purported facts and references to evidence not presented in the District Court nor considered by the Ninth Circuit Court of Appeals.

A. Proceedings

Petitioner filed this action on November 9, 2004 in the United States District Court for the District of Arizona. On December 1, 2004, the City filed its answer. After the parties made disclosures and engaged in discovery, on January 6, 2006 the City moved for summary judgment and filed its separate statement of facts. The City argued that the state law intentional infliction of emotional distress claim was time barred because Petitioner had not filed a timely notice of claim under Arizona law, and that the acts undertaken by the City were not extreme and outrageous conduct to support the claim. The City argued that Petitioner's federal ADA discrimination and retaliation claim were time barred for failure to file a timely charge with the EEOC. The City also argued that Petitioner did not have a disability under the ADA and that Petitioner was not discriminated or retaliated against due to any disability, but he was disciplined and terminated for his threats toward a co-employee and criminal conduct while on administrative assignment.

On June 8, 2006, Petitioner filed his response to the City's dispositive motion and a separate statement of facts. Although the statement of facts referenced a number of purported exhibits, none were attached to the pleading filed with the District Court. On June 23, 2006, the City filed its reply in support of its motion for summary judgment. The City also filed objections and a motion to strike inadmissible evidence referenced in Petitioner's statement of facts. Petitioner did not ever file a response to the City's objections and motion to strike. Petitioner did not ever file in the District Court the omitted exhibits referenced in Petitioner's statement of facts.

On July 24, 2006, oral argument was held before the Honorable Susan R. Bolton on the City's motion for summary judgment. Petitioner was represented at the hearing by attorney Robert Gregory, who represented Petitioner throughout the lower court proceedings. At the hearing, the trial court announced that she was granting the City's motion for summary judgment addressed to Petitioner's state law claim for intentional infliction of emotional distress. After initially taking under advisement the dispositive motion addressed to Petitioner's federal disability discrimination and retaliation claims, on July 25, 2006 the trial court judge granted summary judgment in favor of the City on those remaining federal claims. The trial court stated:

> The statute is clear that Plaintiff had 180 days to file his charge with the EEOC unless he first filed a charge with the appropriate state agency. Plaintiff presented no evidence that he filed a charge with a state agency. . .

> Plaintiff's counsel agreed at oral argument that if the 180 days is the relevant deadline, then all of Plaintiff's federal claims are barred.

(Petition Appdx. 8)

On July 25, 2006, final judgment dismissing the action was entered in favor of the City. On August 23, 2006, Petitioner, acting pro per, timely filed a notice of appeal. By Memorandum Decision issued March 25, 2008, the Ninth Circuit Court of Appeals affirmed the judgement. On the federal claims, the Ninth Circuit Court of Appeals held: "The district court properly concluded that Durand's discrimination claims were time-barred because Durand filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in July 2004, more than 180 days after the termination in early December 2003." (Petition Appdx. 2) The district court's grant of summary judgment on the state law claim was affirmed because the acts alleged "were not sufficiently extreme and outrageous to state a claim for relief for intentional infliction of emotional distress." (Petition Appdx. 2) On May 12, 2008, Petitioner's petition for panel rehearing before the Ninth Circuit Court of Appeals was denied. (Petition Appdx. 11)

B. Facts

The following were the undisputed facts presented to the District Court and which were considered by the Ninth Circuit Court of Appeals:

Beginning on March 20, 2000, Petitioner was employed by the Respondent City of Phoenix ("City") as a Landfill Equipment Operator with the Department of Public Works. On February 15, 2003, Petitioner, while working at the Skunk Creek Landfill, had a problem with the foreman, Gilbert Quintana. As a result of the problem, Petitioner left work without obtaining approval. An investigation of the February 15, 2003 incident was undertaken. On April 4, 2003, based upon the investigation, Petitioner received a written reprimand for his February 15, 2003 conduct. In May 2003, after Petitioner's grievance was denied at two levels, Petitioner chose not to appeal the grievance to the remaining two levels available to him.

On September 8, 2003, Petitioner went to work and was involved in an altercation with Jim Mathis, another employee at the Skunk Creek landfill. Petitioner was so upset from the incident with Mathis and how he felt he was being treated, that on September 9, 2003 Petitioner voluntarily hospitalized himself for a few days.

By notice effective on September 11, 2003, Petitioner was placed on paid administrative leave while the City investigated the September 8, 2003 incident between Petitioner and Mathis. While on administrative leave, Petitioner was assigned to be at his house during normal working hours. An assignment to administrative leave, with home assignment, pending an investigation is not uncommon.

On October 23, 2003, based upon an investigation of the September 8, 2003 incident and having received information from the Phoenix Police Department about Petitioner engaging in allegedly criminal behavior while on City time, a recommendation was made to Director Mark Leonard that Petitioner be terminated. On October 28, 2003, the City notified Petitioner that a pre-termination meeting was to be held on November 6, 2003 to allow Petitioner an opportunity to provide information and speak with Director Leonard. When Petitioner objected to the timing of the meeting, the meeting was re-scheduled for November 10, 2003. However, Petitioner was arrested and was unable to make the November 10, 2003 meeting. On November 10, 2003, the City notified Petitioner that the pre-termination meeting was rescheduled a second time for November 18, 2003.

On November 17, 2003, the City was notified that Petitioner was unable to attend the pre-termination meeting scheduled for November 18, 2003 because Petitioner was still in jail. The City then notified Petitioner by letter, dated November 18, 2003, that he had until December 1, 2003 to submit in writing any information about the September 8, 2003 incident or the alleged inappropriate acts on City time. The letter was delivered to Petitioner in jail. Petitioner signed a document acknowledging receipt of the notice. On December 1, 2003, Durand submitted a written one sentence statement to the City wherein he denied all charges and requested a full hearing after December 10, 2003.

On December 10, 2003, Laura Neal signed the personnel form to terminate Petitioner's employment effective at the end of the day on December 12, 2003. Petitioner was terminated because the City believed he violated Personnel Rules in the September 8, 2003 confrontation with Mathis and, while on City time, Petitioner had on several occasions violated a court order.

On December 17, 2003, Petitioner filed an appeal of his termination to the Civil Service Board. On March 17, 2004, an evidentiary hearing on Petitioner's appeal of his termination was held before an impartial hearing officer. Petitioner was represented by attorney Dale Norris. The hearing officer's April 5, 2004 Hearing Report recites the evidence adduced at the hearing and concluded:

> The greater weight of the credible evidence established that Michael Durand threatened Mathis twice, with words and physical gestures, on September 8, 2003. This conduct violated Personnel Rules 21b2, 21b3 and 21b7, as well as Administrative Regulation 2.325. . . . [and] the only reasonable action on the City's part is to dismiss Durand.

On April 19, 2004, after notice was given to Petitioner, the Civil Service Board considered Petitioner's appeal and the Hearing Report. The Civil Service Board "found that the employee did violate Personnel Rules 21b2, 21b3, and 21b7", but the Board "ordered that the termination be reduced to a 240-hour suspension without back pay."

On July 19, 2004, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination by the City based upon age, disability and retaliation. The Complaint attached as Exhibit B a copy of the August 17, 2004 Dismissal and Notice of Rights from the EEOC which indicated the EEOC was closing its file on Petitioner's charge of discrimination because "[w]e cannot investigate your charge because it was not filed within the time limit required by law."

On July 29, 2004, Petitioner served a written notice of claim upon the City which purported to comply with A.R.S. § 12-821.01, the Arizona notice of claims statute.

REASONS FOR DENYING THE PETITION

The Petition for Certiorari ("Petition") should be denied. There is no compelling reason for this Court to grant certiorari in this case. The Petition fails to demonstrate any conflict with the holdings of other Circuit Courts or this Court. The Ninth Circuit Court of Appeals correctly stated and applied the statutory provisions relating to the timely filing of charges of Americans with Disability Act ("ADA") discrimination and retaliation claims with the EEOC. On appeal to the Ninth Circuit Court of Appeals, Petitioner attempted to raise new arguments and referenced new evidence which were not presented to the District Court, and which were properly ignored by the Ninth Circuit Court of Appeals. Petitioner continues in his Petition to improperly advance new arguments and reference new evidence which were not part of the proceedings in the lower courts.

I. Petitioner Offers No Compelling Reason For The Grant Of Certiorari Regarding The Dismissal Of The ADA Claims

In the Petition, Petitioner posits the issue as whether this Court will recognize and adjudicate in this Court a cause of action for retaliation based upon arguments presented in the lower courts. Simply put, such a position is preposterous! Buried beneath the convoluted presentation in the Petition is the true issue of whether the Ninth Circuit Court of Appeals properly analyzed the timeliness of Petitioner's filing of his charge of discrimination. The Ninth Circuit Court of Appeals, and the District Court before it, both correctly analyzed the law, and the evidence properly before them led them to conclude Petitioner failed to timely file his charge of discrimination.

A person with a claim under the ADA must timely pursue an administrative remedy with the EEOC before they can file suit. 42 U.S.C. § 12117(a) (Petition Appdx. 18). In order to be timely, the claimant must file a discrimination charge with the EEOC within 180 days after the alleged violation. 42 U.S.C. § 2000e-5(e)(1) (Petition Appdx. 22). If the claimant "initially instituted proceedings with a State or local agency with authority to grant or seek relief from such [unlawful employment] practice", then a claimant has up to 300 days after the alleged unlawful employment practice to file with the EEOC. *Id.*; *see also Edelman v. Lynchburg College*, 535 U.S. 106, 109 n.1 (2002).

The law on timeliness of ADA charges of discrimination was properly applied to the facts presented in the District Court and reviewed on appeal by the Ninth Circuit Court of Appeals. On July 19, 2004, more than 180 days after his December 12, 2003 termination, Petitioner filed a charge of discrimination with the EEOC alleging discrimination by the City based upon age, disability and retaliation leading up to his termination. No evidence was presented that a similar charge was filed with a State or local agency with authority over similar equal employment opportunity charges. While the Petition refers to a purported 2008 work sharing agreement(Petition Appdx. 42-55), such unauthenticated agreement was not presented in the District Court or to the Ninth Circuit Court of Appeals. Nor, more importantly, was there any evidence presented that in 2004 a similar work sharing agreement was in place. The Petition also appends a number of unauthenticated purported EEOC publications (Petition Appdx. 56-65) and notices (Petition Appdx. 66-67, 71-76, 79-80) which were not presented to the District Court and, therefore, were not considered by the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals understandably and correctly refused to consider Petitioner's new contentions and evidence submitted on appeal, and decided the case based upon the record from the District Court. (Petition Appdx. 2)

There is no good reason to grant certiorari here as to any question relating to the dismissal of the ADA claims due to untimely filing with the EEOC. The Ninth Circuit Court of Appeals properly analyzed the issue of the timeliness of the EEOC filing here. Based upon the

evidence before the District Court, the appellate court properly determined that the EEOC filing was untimely, thereby barring the ADA claims.

II. Petitioner Raises For The First Time A New Argument Regarding His Dismissed State Law Claim And Offers No Compelling Reason For The Grant Of Certiorari Regarding The Dismissal Of The State Law Claim

In the Petition, Petitioner asserts that the lower courts improperly decided the state law claim for intentional infliction of emotional distress, and instead should have deferred decision on the merits of the state law claim to state courts after the federal claims had been dismissed. First, this argument was never raised in the District Court or before the Ninth Circuit Court of Appeals. This Court should not hear Petitioner's argument presented for the first time in the Petition.

Second, Petitioner offers no compelling reason for a grant of certiorari by this Court. No conflict with other decisions from this Court or other Circuit Courts have been asserted. Petitioner cites two prior Supreme Court cases, but only for the general proposition that a District Court has the power, if it chooses, to decline to decide pendent state law claims. Neither decision is impacted by the District Court's decision here to go forward to decide the state law claim. The District Court unquestionably had discretion as to whether to decide state law claims or to dismiss such claims without prejudice so they may be decided by a state court. *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 618 (2002); 28 U.S.C. § 1367(c)

(2004) (district courts "may decline to exercise supplemental jurisdiction over a claim if . . . the district court has dismissed all claims over which it has original jurisdiction".).

The entire premise of Petitioner's argument is also faulty since the state law claim here was decided before a decision was rendered as to the federal claims. On July 24, 2006, the District Court decided the state law claim in its ruling from the bench which was confirmed in a minute entry. The next day, the District Court issued its minute entry deciding the federal claims, and instructing the Clerk to enter the final order dismissing the entire action.

Third, the circumstances here fully justify ruling on the merits. Discovery had been completed, the motion for summary judgment was briefed as to both federal and state law claims, and the state law claims were decided before the dismissal of the federal claims. Petitioner also did not request that the District Court or the Ninth Circuit Court of Appeals abstain from deciding the merits, but only argued the merits of the state law claim.

The Petition also erroneously suggests that the state law claim for intentional infliction of emotional distress was not time barred. Only on July 29, 2004, more than 180 days after Petitioner's termination, did Petitioner serve a notice of claim on the City. The District Court actually held that Petitioner's claim for infliction of emotional distress was almost completely barred for failure to timely comply with Arizona's 180 day notice of claim statute, A.R.S. § 12-821.01(A).

Petitioner's counsel admitted as much to the District Court. The only tortious act which Petitioner's counsel suggested was not time barred was the purported offer in October 2004 of a Last Chance Agreement. The District Court held an offer of such an agreement was not actionable as extreme and outrageous conduct. No notice of claim under Arizona law was ever served in relation to the Last Chance Agreement (as it was purportedly offered months after Petitioner's July 29, 2004 notice of claim), so any claim would also have been barred under A.R.S. § 12-821.01(A). The purported Last Chance Agreement, although appended to the Petition (Petition Appdx. 77-78), was not actually presented to the District Court. When the Last Chance Agreement and Petitioner's 2005 EEOC Charge of Discrimination (Petition Appdx. 79-80) were offered for the first time on appeal to the Ninth Circuit Court of Appeals, they were understandably and correctly ignored in deciding the issues on appeal.

There is no good reason to grant certiorari here as to the proposed question relating to the dismissal of the state law claim. The issue presented by the Petition was not even raised before the Ninth Circuit Court of Appeals. Under the circumstances of this case, there also was nothing improper in the lower courts deciding the merits of the state law claims.

CONCLUSION

The Petition for Certiorari should be denied. There is no compelling reason demonstrated for this Court to exercise its discretion to review the Memorandum Decision of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

BRADLEY D. GARDNER
Counsel of Record
DAVID R. SCHWARTZ
UDALL, SHUMWAY & LYONS, P.L.C.
30 W. First Street
Mesa, Arizona 85201
(480) 461-5300

Attorneys for Respondent

APPENDIX

APPENDIX — ARIZONA REVISED STATUTE § 12-821.01

A. Persons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim which is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

B. For purposes of this section, a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.

C. Notwithstanding subsection A, any claim which must be submitted to a binding or nonbinding dispute resolution process or an administrative claims process or review process pursuant to a statute, ordinance, resolution, administrative or governmental

rule or regulation, or contractual term shall not accrue for the purposes of this section until all such procedures, processes or remedies have been exhausted. The time in which to give notice of a potential claim and to sue on the claim shall run from the date on which a final decision or notice of disposition is issued in an alternative dispute resolution procedure, administrative claim or review process. This provision shall not be construed to prevent the parties to any contract from agreeing to extend the time for filing such notice of claim.

D. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within one hundred eighty days after the disability ceases.

E. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

F. This section shall apply to all causes of action which accrue on or after the effective date of this section.

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No. 08-335

Supreme Court, U.S.
FILED
NOV 2 8 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL B. DURAND,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

*BRUCE TYLER WICK
Attorney at Law
19443 Lorain Road
P.O. Box 26165
Fairview Park, OH 44126
440-331-9425

Counsel for Petitioner

**Counsel of Record*

November, 2008

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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42 U.S.C. § 2000e-5(e)(1) (1994 ed.) 2

IN ITS BRIEF IN OPPOSITION, THE CITY OF PHOENIX ADMITS TO FRAUD UPON THIS COURT, THE COURT OF APPEALS AND THE DISTRICT COURT

No amount of artifice can conceal the City's fraud, misrepresentation and related misconduct – in this court and in the lower federal courts, which have considered this case. Civil Rule 60(b)(3) and (d)(3).

The City concealed, and still attempts to conceal, the existence of the Worksharing Agreement Between EEOC and the Arizona Civil Rights Division, dated 4 October 2007 [Petition Appendix 42-55] – disparaging the Agreement as "purported," and "unauthenticated." [*Opposition*, at 9]

Though the City is well aware of the significance of these EEOC worksharing agreements, even citing the pertinent case and footnote; its representatives forbear from quoting the case. [*Opposition,* at 8] However, Mr. Durand will reproduce the relevant passage in full:

> "1. A Title VII complainant generally has 180 days from the time of the alleged unlawful employment practice to file with the EEOC, 42 U.S.C. § 2000e-5(e)(1) (1994 ed.) but a 300-day filing period applies if the charging party 'institute[s] proceedings with a State or local agency with authority to grant or seek relief' from unlawful employment practices. Ibid; see also *EEOC v. Commercial Office Products Co.*, 386 U.S. 107 (1998). ***Virginia has such***

> ***an agency, operating under a work-sharing agreement with the EEOC.*** See *Tinsley v. First Union Nat. Bank*, 155 F.3d 435-444 (CA4 1998)." *Edelman v. Lynchburg College*, 535 U.S. 106, 109 n.1 (2002)." [Emphasis added]

Reading is not necessarily understanding. Does the City in its Brief in Opposition evince full *understanding* of the significance of the Worksharing Agreement Between EEOC and the Arizona Civil Rights Division, dated 4 October 2007 [Petition Appendix 42-55]; namely, that "a 300-day filing period applies"? *Edelman*, supra, n.1.

The answer is in the affirmative. In the City's very next paragraph of the Brief in Opposition, its representatives go on to say –

> "While the Petition refers to a purported 2008 worksharing agreement (Petition App. 42-55), such unauthenticated agreement was not presented in the District Court or to the Ninth Circuit Court of Appeals. Nor, more importantly, was there any evidence presented that in 2004 a similar worksharing agreement was in place." [*Opposition*, at 9]

Thus, the City in its Brief in Opposition doubts both the authenticity of the Worksharing Agreement and (oblivious to the contradiction) whether "in 2004 a similar worksharing agreement was in place." Ibid. However, the court will kindly note the City's conditional admission that *had* a similar worksharing

agreement been in place in 2004, *the 300-day filing period would have applied.*

Preceding the "purported" Worksharing Agreement [Petition App. 44-55] is a transmittal letter from EEOC to Mr. Durand, dated 27 May 2008 [Petition App. 42-43]. That transmittal letter indicates the Worksharing Agreement enclosed is EEOC's response to Mr. Durand's request *"for the latest copy* of the Worksharing Agreement between the Arizona Civil Rights Division and the EEOC." [Ibid., emphasis added]

By the time the City addressed this Court on 2 October 2008, in its Brief in Opposition, the City had been confronted with the Worksharing Agreement; the likely existence of a "similar" Worksharing Agreement in 2004; as well as what follows from such worksharing agreements: that "a 300-day filing period applies." [*Edelman,* supra, n.1; and *Opposition,* at 9]

May one infer, however, that the City came by this knowledge in time to mislead, not just this court but three federal courts, as to the EEOC filing requirement in Arizona? Well, the City does not argue – as it would have, had it been innocent – that either the 300-day filing requirement had changed over time; or that the City's own understanding of filing requirements had been altered by events.

A "smoking gun," however, exists in the public domain, and may be found on the City's own Official

Website, within the Phoenix Equal Opportunity Department's web pages:

> **"City Employment**
>
> Any City employee and/or job applicant who believe [sic] that he/she has been discriminated against in any aspect of employment or its process, may file a formal complaint of discrimination with the Equal Opportunity Department. Complaints of discrimination or harassment on the basis of race, color, religion, sex, age, disability or sexual orientation must be filed within 180 days of the alleged act(s) of discrimination. ***The 180-day time limit does not affect the complaint rights of those filing external complaints with federal/state agencies.*** An employee may also select to file an internal complaint within his/her own department. Job applicants may avail themselves of filing an internal complaint through the Personnel Department if they so choose." [App. 3, emphasis added]

The court's attention is respectfully directed to the emphasized language in the paragraph just quoted: "The 180-day time limit does not affect the complaint rights of those filing external complaints with federal/state agencies." Ibid.

Yet, knowing full well the 300-day filing requirement applied in Arizona; the City four times tells this court, as it told the lower federal courts, the 180-day requirement applied:

First instance:

"The Ninth Circuit Court of Appeals correctly stated and applied the statutory provisions relating to the timely filing of charges of Americans with Disability [sic] Act ("ADA" discrimination and retaliation claims with the EEOC." [*Opposition,* at 7]

Second instance:

"The Ninth Circuit Court of Appeals and the District Court before it, both correctly analyzed the law, and the evidence properly before them led them to conclude Petitioner failed to timely file his charge of discrimination." [*Opposition,* at 8]

Third instance:

"The law on timeliness of ADA charges of discrimination was properly applied to the facts presented in the District Court and reviewed on appeal by the Ninth Circuit Court of Appeals." [*Opposition,* at 9]

Fourth instance:

"The Ninth Circuit Court of Appeals properly analyzed the issue of the timeliness of the EEOC filing here. Based upon the evidence before the District Court, the appellate court properly determined that the EEOC filing was untimely, thereby barring the ADA claims." [*Opposition,* at 9-10]

What is to be done with a city, which misleads to their detriment three federal courts? Should not this

court relieve Mr. Durand from the judgments below – obtained as they were, by fraud, misrepresentation or misconduct? Civil Rule 60(b)(3) and (d)(3).

Also, the City of Phoenix is a "local agency" for federal civil rights purposes. [App. 1-9] Non-lawyers are expected to bring their own discrimination complaints:

> " . . . Congress presumably did not mean to affect the nature of Title VII as 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.' *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1988); *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)." *Edelman v. Lynchburg College,* 535 U.S. 106, 115 (2002).

Even without the "Smoking Gun" [App. 3], quoted above, this court could – probably should – infer the City's actual or constructive knowledge of the Worksharing Agreement from the City's status as a "local agency," as well as its repeated references to both EECO and the Arizona Civil Rights Division [App. 2-9].

In light of all this, some thought should also be given to removing the City of Phoenix from its "oversight responsibility" "to ensure Americans With Disabilities Act (ADA) implementation" [App. 1] – as the first responsibility of law enforcement is to observe the law itself. "All the officers of the government, from the highest to the lowest, are creatures of

the law and are bound to obey it." *United States v. Lee,* 106 U.S. 196, 221 (1882).

DISTRICT COURT'S MISHANDLING OF PETITIONER'S ARIZONA CLAIM FOR EMOTIONAL DISTRESS (AND THE CITY'S MISINTERPRETATION OF THAT MISHANDLING)

Mr. Durand's Arizona claim for emotional distress took on added, even extreme, importance, in light of the District Court's doubts about the timeliness of Mr. Durand's ADA claims. Circumstances, which should have counseled caution, instead seem to have inspired the District to boldness in disposing of Mr. Durand's Arizona claim for emotional distress. As to the reason for the District Court's partial summary judgment on the state law claim, the Ninth Circuit concluded,

> "The district court also properly concluded that the acts Durand complained of were not sufficiently extreme and outrageous to state a claim for relief for intentional infliction of emotional distress." [Petition App. 2]

Thus, so far as the Ninth Circuit was concerned, Mr. Durand's emotional distress claim was dismissed on its merits, for failure to state a claim, and not for untimeliness or any other reason.

In this court, neither party has quarreled with the Ninth Circuit's conclusion, as to the reason for the

District Court's decision. In fact, the City even quotes the Ninth Circuit on this point. [*Opposition,* at 3] The District Court itself did not state its reasons for dismissing the emotional distress claim, though these can no doubt be gleaned from the Transcript of the Summary Judgment Hearing of 24 July 2006, which is part of the record on appeal.

Mr. Durand's emotional distress claim was contained in Count Four (the last Count) of his Complaint. [Petition App. 39] Count Four re-alleges and incorporates by reference the previous Counts, involving Mr. Durand's ADA and other federal claims – this time, though, under the Arizona rubric of emotional distress. Kindly see, for example, Paragraph 44 of the Complaint. [Petition App. 39]

In response to Mr. Durand's suggestion that his state law claim should have been remanded to state court, rather than dismissed as legally insufficient; the City argues –

> – that the only claimed instance of emotional distress, which was *not* time-barred, was the City's attempt to impose a "Last Chance Agreement"; and
>
> – that the "Last Chance Agreement" "was not actually presented to the District Court." [*Opposition*, at 12]

All the more reason for a remand, then, so that a state court could apply state law to the facts of a state case; including whether some of the claimed emotional distress might be time-barred. Perhaps Arizona

has a rule of "background evidence," similar to the one approved by this court in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002):

> "Nor does the statute bar an employee from using the prior acts ***as background evidence in support of a timely claim.***" [Emphasis added]

If Arizona does have such a rule, why could not such "background evidence" support the ***sufficiency*** of a timely claim for emotional distress, either in state or federal courts? There is no indication, anywhere in the transcript, the District Court considered, or was even aware of, this rule of "background evidence." In fact, all signs point the other way:

> "THE COURT: Tell me what – tell me – give me an example of an outrageous event attributable to the City of Phoenix *that occurred after January 30th, 2004*. [Transcript of the Summary Judgment Hearing of 24 July 2006, p. 16, emphasis added]

If the City's proposed Last Chance Agreement "was not actually presented to the District Court" in exhibit form [*Opposition*, at 12]; it was nevertheless "before the court," in the sense the District Court knew of it, discussed it, understood its purport and acted upon it:

> "THE COURT: Tell me what – tell me – give me an example of an outrageous event attributable to the City of Phoenix that occurred after January 30th, 2004.

> MR. GREGORY: Mr. Durand's attempt to return to work under the premise that he would first have to sign a Last – what was literally entitled a Last Chance Agreement, that he was coming back to work under –
>
> THE COURT: No, I understand that they – that after he got a reversal of the termination, it was changed to a period of suspension. When he tried to come back to work, the City of Phoenix said, Okay, but you've got to sign this thing that acknowledges this is your last chance. Anything else happens, you're out of here. . . . " [Transcript of the Summary Judgment Hearing of 24 July 2006, p. 16; see also, p. 19]

If Mr. Durand's federal claims were going to be dismissed, his Arizona claim for emotional distress – all of it – should certainly have been remanded to state court. *Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351-353 (1988).

CONCLUSION

For the foregoing reasons, this court should grant Mr. Durand's Petition for Rehearing and proceed to consider the cause on its merits.

Respectfully submitted,

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November, 2008

RULE 44 CERTIFICATION OF COUNSEL

This will certify that this Petition for Rehearing is restricted to the grounds set forth in Rule 44(2); namely, that the Petition is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Further, I certify this Petition for Rehearing is presented in good faith and not for delay.

28 November 2008

BRUCE TYLER WICK
Counsel for Petitioner

Disability Access In The City Of Phoenix

http://phoenix.gov/CITZASST/disabilt.html

The Equal Opportunity Department has oversight responsibility within Phoenix city government to ensure Americans With Disabilities Act (ADA) implementation. If you have any questions, contact the Equal Opportunity Department at 602-262-7486, TTY 602-534-1557 or fax 602-495-0517.

» **You Have a Right to Acessible** [sic] **Programs, Services & Activities in *English* and *Espanol* Department**

» **ADA Liaison Directory**

» **ADA Compliance Efforts**

» **ADA Regulations and Disability Related Linkages**

» **City Department TTY Numbers**

Discrimination Complaints

http://phoenix.gov/EOD/complnts.html

Employment Discrimination Complaints

It is illegal to discriminate on the basis of race, color, sex, religion, national origin or marital status in any aspect of employment. The city investigates employment discrimination complaints against Phoenix employers of 14 or fewer employees. If you suspect you have been discriminated against in employment, call the Equal Opportunity Department's Compliance and Enforcement Division at 602-262-7486/voice or 602-534-1557/TTY. Federal and state governments investigate larger employers. Call the federal Equal Employment Opportunity Commission (602-640-5000/voice or 1-800-514-0393/TTY) or the Arizona Civil Rights Division of the Attorney General's Office (602-542-5263/voice or 602-542-5002/TTY). It also is illegal for the city or any city contractor or supplier with more than 35 employees to discriminate on the basis of sexual orientation. The city also will investigate these complaints.

Note: Persons with disabilities are protected against discrimination under the Americans with Disabilities Act and the Arizonans with Disabilities Act. This protection is afforded to all employees who work for employers with more than 15 employees. For more information contact the U.S. Equal Employment Opportunity Commission (602-640-5000/voice or 1-800-669-6820/TTY) or the Arizona Attorney General's Office (602-542-5263/voice or 602-542-5002/TTY). Persons with

disabilities who work for employers with less than 15 employees should contact a private attorney for assistance.

Small Employer Employment Discrimination Complaint Questionnaire Form

City Employment

Any City employee and/or job applicant who believe that he/she has been discriminated against in any aspect of employment or its process, may file a formal complaint of discrimination with the Equal Opportunity Department. Complaints of discrimination or harassment on the basis of race, color, religion, sex, age, disability or sexual orientation must be filed within 180 days of the alleged act(s) of discrimination. The 180 day time limit does not affect the complaint rights of those filing external complaints with federal/state agencies. An employee may also select to file an internal complaint within his/her own department. Job applicants may avail themselves of filing an internal complaint through the Personnel Department if they so choose.

City Employment Discrimination Complaint Questionnaire Form

Housing Discrimination Complaints

It is illegal to discriminate on the basis of race, color, sex, national origin or religion in the sale, lease, insuring or financing of housing. It also is illegal to

discriminate against families with children or individuals with disabilities. The Equal Opportunity Department investigates housing discrimination complaints within the city of Phoenix. If you suspect you have been discriminated against in housing, call the Compliance and Enforcement Division at 602-262-7486/voice or 602-534-1557/TTY.

Housing Discrimination Complaint Questionnaire Form

Public Accommodations Complaints

It is illegal to refuse or restrict service at any place of public accommodation on the basis of race, color, sex, religion, marital status or national origin. This includes Phoenix restaurants, hotels, theaters, parks, hospitals, nightclubs, health spas and all establishments offering services to the general public. The city will investigate complaints. Call the Equal Opportunity Department's Compliance and Enforcement Division at 602-262-7486/voice or 602-534-1557/TTY.

Note: Persons with disabilities are afforded protection against discrimination under the Americans with Disabilities Act and the Arizonans with Disabilities Act. The laws address access to facilities and services for persons with disabilities in places of public accommodation. For more information contact the U.S. Department of Justice (1-800-514-0301/voice or 1-800-504-0383/TTY) or the Arizona Attorney General's Office (602-542-5263/voice or 602-542-5002/TTY).

Americans With Disabilities Act (ADA) Complaints

Under the Americans With Disabilities Act, individuals with disabilities must have access to all city services, programs, activities and facilities. Any person believing that such access is not available at a city of Phoenix facility or program should contact the Equal Opportunity Department Compliance and Enforcement Division at 602-262-7486/voice or 602-534-1557/TTY. For property not associated with the city of Phoenix, call the Arizona Attorney General's Office (602-542-5263/voice or 602-542-5002/TTY) or Department of Justice ADA Information Line (1-800-514-0301/voice or 1-800-514-0383/TTY).

Smoking Complaints

In Phoenix, it is illegal to retaliate in the form of termination or discipline against persons who complain about smoking in the workplace. The law applies to all employers regardless of size within the Phoenix city limits. If you suspect you may have been retaliated against, call the Compliance and Enforcement Division at 602-262-7483/voice or 602-534-1557/TTY.

EMPLOYMENT DISCRIMINATION IS AGAINST THE LAW IN PHOENIX

http://phoenix.gov/EOD/discempl.html

What is fair employment?

All people have the right to compete for any job for which they qualify and to work in an environment that is free from discrimination. The city of Phoenix accepts external employment discrimination complaints on the basis of the following protected groups:

- Race
- Sex
- Color
- Religion
- National origin
- Marital status
- Sexual orientation (in certain cases – described below)

Note: Persons with disabilities are protected against discrimination under the Americans with Disabilities Act and the Arizonans with Disabilities Act. This protection is afforded to all employees who work for employers with more than 15 employees. For more information, contact the U.S. Equal Employment Opportunity Commission at 602-640-5000/voice or

1-800-669-6820/TTY, or the Arizona Attorney General's Office at 602-542-5263/voice or 602-542-5002/TTY.

City of Phoenix employees with disabilities also may file a complaint with the Equal Opportunity Department at 602-262-7486/voice or 602-534-1557/TTY.

Persons with disabilities who work for employers with less than 15 employees should contact a private attorney for assistance.

To whom does the law apply?

- The city of Phoenix accepts complaints against businesses within Phoenix city limits that have fewer than 15 employees.
- For businesses with 15 or more employees, the city refers the complaints to the U.S. Equal Employment Opportunity Commission and the Arizona Civil Rights Division.
- Companies with 35 or more employees that do business with the city of Phoenix as a contractor, subcontractor, vendor or supplier may not discriminate against anyone on the basis of sexual orientation

What are some examples of employment discrimination?

- Failure or refusal to interview or hire qualified women because they are pregnant.
- Dismissal of an Hispanic employee for missing work, yet other employees who are absent are not fired.

- Paying minorities less than non-minorities for the same work.
- Retaliation against employees who complain of discrimination or file a complaint of discrimination.
- Failure to provide a reasonable accommodation for an employee's religious belief. For example, a request for an unpaid day off on a religious holiday.

What should I do if I suspect an employer is discriminating against me?

- Keep a record of the incident. Document the date, time, location and comments made to you.
- Collect information and documentation such as witness names, pay stubs, etc. that will support your allegations.
- Contact the Equal Opportunity Department. Trained staff will review your complaint and determine if a violation has occurred.

When must I file a discrimination complaint?

- If you suspect you have been discriminated against in employment, you can file an online complaint by clicking here or by contacting the Equal Opportunity Department Compliance and Enforcement Division voice line at 602-262-7846 or the TTY relay at 602-534-1557 or fax 602-495-0571. A complaint must be filed within 180 days of the alleged incident. The department will report

its results to you within 150 days from the date you first filed the complaint.

What will the Equal Opportunity Department do with my complaint?

- The incident will be reviewed to determine that this office has proper jurisdiction over the matter.
- If this office has proper jurisdiction, an attempt will be made to resolve the complaint with all the parties to the incident.
- If a resolution is not possible, the assigned investigator will assess the case for the best course of action, which may involve an investigation.

Where can I get more information?

City of Phoenix
Equal Opportunity Department
Compliance & Enforcement Division
251 W. Washington St., 7th Floor
Phoenix, AZ 85003-2295

602-262-7486
602-534-1557/TTY
602-495-0517/Fax